Back Pay and Extra-Judicial Proceedings: Is the Office of Federal Contract Compliance Programs Exceeding Its Authority?

CARMEN G. SLOMINSKI* and HAZEL M. WILLACY**

I. INTRODUCTION

Government contracts occupy a special place in the law. Because it generally has been thought that the government is vested with "far greater power with respect to [government] contractors than it is with respect to others,"[1] government contracts have become a vehicle for implementing a variety of social programs. By imposing contractual obligations on private employers who choose to contract with the federal government, the executive branch has developed an elaborate program designed to provide equality in employment opportunities. That program is the focal point of this Article.[2]

Executive Order 11246[3] is the nucleus of the federal antidiscrimination program. Generally, the Order requires: (1) that all government contracts contain a clause that prohibits employers from discriminating on the basis of race, color, religion, sex, or national origin; and (2) that government contractors take "affirmative action" to ensure nondiscrimination.[4] Executive Order 11246 also requires that contractors

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* Associate, Baker & Hostetler, Cleveland, Ohio; J.D., Ohio State Univ., 1973.

** Associate, Baker & Hostetler, Cleveland, Ohio; J.D., Case Western Reserve Univ., 1976.

1. Uniroyal, Inc. v. Marshall, 20 Fair Empl. Prac. Cas. 437, 440 (D.D.C. 1979).

2. Several courts have addressed the question of whether the Executive has the power or discretion to carry out the social objective of achieving equality of opportunity in employment by imposing nondiscrimination clauses in government contracts. These courts have generally concluded that such power "seems to be authorized by the broad grant of procurement authority." Contractors Ass'n of E. Pa. v. Secretary of Labor, 442 F.2d 159, 170 (3rd Cir.), *cert. denied*, 404 U.S. 854 (1971). *See also* United States v. New Orleans Pub. Serv., Inc., 553 F.2d 459 (5th Cir. 1977), *vacated and remanded on other grounds*, 436 U.S. 942 (1978). For purposes of this discussion, the authors have assumed that the Executive has the power to carry out such social objectives. This Article questions only the manner in which the Secretary of Labor purports to enforce the contractual requirement of equal employment opportunity.

The scope of this Article is limited to a discussion of the obligations of those employers who have a contractual relationship with the government. Any rights or obligations imposed by virtue of an employer's receipt of federal funds for reasons unrelated to the existence of a government contract are beyond the scope of this Article.

3. 30 Fed. Reg. 12,139 (1965). The full text of Exec. Order No. 11246, as amended, can be found in LAB. REL. REP. (BNA) LRX 2301, and the text of Exec. Order No. 11478, 34 Fed. Reg. 12,985 (1969), which superseded Part I of Exec. Order No. 11246, in LAB. REL. REP. (BNA) LRX 2311. Exec. Order No. 12086, 3 C.F.R. 230 (1979), amended Exec. Order No. 11246 by consolidating the authority for administration and enforcement of the antidiscrimination provisions in the Secretary of Labor.

4. Section 202(1) of Exec. Order No. 11246, LAB. REL. REP. (BNA) LRX 2301, requires the following clause be included in all government contracts except those exempted from the Order's coverage:

> During the performance of this contract, the contractor agrees as follows:
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> (1) The contractor will not discriminate against any employee or applicant for employment because of race, color, religion, sex, or national origin. The contractor will take affirmative action to ensure that applicants are employed, and that employees are treated during

comply with the rules, regulations, and relevant orders of the Secretary of Labor,[5] who is charged with administration and enforcement of the Order.[6]

The Secretary, through the Office of Federal Contract Compliance Programs (OFCCP), has issued regulations[7] that call for compliance reviews of the affirmative action programs established by employers[8] to meet the requirements of the Order. In the event of noncompliance with the dictates of the Order, the regulations provide for extra-judicial[9] resolution by means of "conciliation agreements" between the contractor and OFCCP.[10] These agreements provide for, among other things, "such remedial action as may be necessary to correct the violations and/or

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employment, without regard to their race, color, religion, sex or national origin. Such action shall include, but not be limited to the following: employment, upgrading, demotion, or transfer; recruitment or recruitment advertising; layoff or termination; rates of pay or other forms of compensation; and selection for training, including apprenticeship. The contractor agrees to post in conspicuous places, available to employees and applicants for employment, notices to be provided by the contracting officer, setting forth the provisions of this nondiscrimination clause.

5. Exec. Order No. 11246 § 202(4), LAB. REL. REP. (BNA) LRX 2301.

6. *Id.* § 201.

7. 41 C.F.R. §§ 60-1.20 to -1.32 (1979).

8. The regulations require certain employers to develop a written affirmative action compliance program that contains specific data and goals for achieving, *inter alia*, sexual and racial balance in the employer's workforce. 41 C.F.R. §§ 60-1.40, -250.5, -741.5 (1979).

9. The term "extra-judicial," as used in this Article, refers to any action other than a suit brought in federal court. It includes conciliation as well as quasi-judicial administrative proceedings conducted by an administrative law judge pursuant to 41 C.F.R. §§ 60-30.1 to -30.30 (1979).

10. The regulations covering conciliation agreements were amended in 1979. 44 Fed. Reg. 77,000, 77,002. As amended, they provide as follows:

§ 60-1.33 Conciliation agreements.

(a) If a compliance review, complaint investigation or other review by OFCCP or its representative indicates a material violation of the equal opportunity clause, and (1) if the contractor, subcontractor or bidder is willing to correct the violations and/or deficiencies, and (2) if OFCCP or its representative determines that settlement (rather than referral for consideration of formal enforcement) is appropriate, a written agreement shall be required. The agreement shall provide for such remedial action as may be necessary to correct the violations and/or deficiencies noted, including, where appropriate (but not necessarily limited to), remedies such as back pay and retroactive seniority.

(b) The term "conciliation agreement" does not include "letters of commitment" which are appropriate for resolving minor technical deficiencies.

§ 60-1.34 Violation of a conciliation agreement or letter of commitment.

(a) When a conciliation agreement has been violated, the following procedures are applicable:

(1) A written notice shall be sent to the contractor setting forth the violations alleged and summarizing the supporting evidence. The contractor shall have 15 days from receipt of the notice to respond, except in those cases in which such a delay would result in irreparable injury to the employment rights of affected employees or applicants.

(2) During the 15-day period the contractor may demonstrate in writing that it has not violated its commitments.

(3) If the contractor is unable to demonstrate that it has not violated its commitments, or if the complaint alleges irreparable injury, enforcement proceedings may be initiated immediately without issuing a show cause notice or proceeding through any other requirement contained in this chapter.

(b) If the contractor has violated a letter of commitment, the matter shall be handled, where appropriate, pursuant to 41 CFR 60-2.2(c) or 41 CFR 60-4.8. The violation may be corrected through a conciliation agreement, or an enforcement proceeding may be initiated.

41 C.F.R. § 60-1.33 to -1.34. OFCCP has also issued proposed amendments to § 60-1.26, which

deficiencies noted, including, where appropriate, remedies such as *back pay and retroactive seniority*."[11]

The alternative to settlement through a conciliation agreement is administrative enforcement proceedings, which ultimately could lead to the imposition of severe sanctions, including cancellation of all existing contracts and debarment of the contractor.[12] Since government contractors rely heavily on the income derived from government contracts, contract cancellation, debarment, or both, can have a devastating impact.[13] When faced with a "show cause" letter[14] alleging a violation of one or more of the provisions of Executive Order 11246 or the regulations thereunder, most contractors accordingly choose the less expensive and more expeditious route of settlement.[15] As a result, back pay awards, usually essential to any settlement, have become an important part of equal employment opportunity enforcement. This Article will examine the validity of extra-judicial imposition of back pay by OFCCP. The inquiry

delineates the procedural requirements which must be followed in negotiating a conciliation agreement. If the amendments are adopted, § 60-1.26 will provide as follows:

§ 60-1.26 Conciliation agreements.

(a) A conciliation agreement is a written agreement between OFCCP and a contractor by which the contractor undertakes specific obligations to correct or remedy noncompliance with the Order or with sections 402 or 503. A conciliation agreement normally is required where a compliance review, complaint investigation or some other review discloses violations of the Order of sections 402 and 503, and (1) the contractor is willing to correct the violations or deficiencies and (2) OFCCP determines that a settlement (rather than formal enforcement) is appropriate. The agreement shall provide for the remedial relief necessary to correct the violations or deficiencies which may include priority rights to hire or promotion, training, back pay, front pay and retroactive seniority, etc., for an affected class or for individuals, as appropriate.

(b) A conciliation agreement shall include (1) a statement of each deficiency or violation; (2) the corresponding precise remedial action to be taken and a timetable for implementation; (3) a requirement for periodic reporting to OFCCP as to implementation of the agreement, if appropriate; and (4) a copy of the notice to show cause or notice of violation when such has been previously issued.

(c) A conciliation agreement is effective when it has been signed by the contractor and the proper Assistant Regional Administrator, OFCCP, unless, within 45 days of receipt from the Assistant Regional Administrator, the Director rejects the agreement.

(d) Conciliation agreements shall not be entered into after enforcement proceedings have been initiated. Settlement of enforcement proceedings by the Office of the Solicitor normally will be by consent decree.

(e) Letters of commitment, in lieu of conciliation agreements are appropriate for resolving minor technical deficiencies.

44 Fed. Reg. 77,006, 77,012-13 (1979). According to the accompanying comments, the section "codifies existing OFCCP practices and procedures." *Id.* at 77,007.

11. Section 60-1.33, 44 Fed. Reg. 77,002 (1979) (emphasis added). The regulations have provided for a back pay remedy since 1977. *See* 41 C.F.R. §§ 60-1.26, -2.1 (1977).

12. 41 C.F.R. §§ 60-1.26(a)(2), -1.26(d) (1979).

13. Consider, for example, the possibility of survival of a financial institution if its federal insurance is withdrawn. *Cf.* Harris Trust & Sav. Bank v. Marshall, 20 Fair Empl. Prac. Cas. 558 (N.D. Ill. 1979).

14. *See* 41 C.F.R. § 60-2.2(c) (1979).

15. In fiscal year 1979, OFCCP claims to have collected nearly $9.3 million in equal opportunity settlements, "more than twice the amount collected for workers since fiscal 1978." 103 LAB. REL. REP. 48 (BNA) (1980). Out of that amount, back pay awards, payable to more than 2,100 persons, constituted more than $3.7 million. Not included in the figures was the $5.2 million back pay award obtained from Uniroyal, Inc. DAILY LAB. REP. (BNA) A-17, 18 (October 23, 1979). The full text of the Uniroyal settlement agreements is printed at DAILY LAB. REP. (BNA) D-1 (October 29, 1979).

will focus on OFCCP's power under Executive Order 11246, Title VII of the Civil Rights Acts of 1964,[16] and constitutional due process principles. This Article also will examine the back pay regulations promulgated under Executive Order 11246 to determine whether OFCCP's enforcement measures are valid in light of the requirements of the Administrative Procedure Act.[17]

II. THE SEARCH FOR A SUBSTANTIVE NEXUS

Any analysis of the validity of an administrative regulation must begin with the principles established in *Chrysler Corp. v. Brown*.[18] In *Chrysler* the Supreme Court set forth three requirements that must be satisfied if a regulation is to have the "force and effect of law": (1) the regulation must be a substantive or "legislative-type" rule; (2) it must be rooted in a congressional grant of authority; and (3) it must be promulgated in accordance with any procedural standards established by Congress.[19] Accordingly, if the OFCCP back pay regulations are to pass muster, they must satisfy each of these requirements.

There is little question that the OFCCP regulations satisfy the first criterion. The Court has defined a substantive rule as one that "affect[s] individual rights and obligations."[20] The millions of dollars of liability that have been imposed upon contractors[21] clearly bring the regulations within the ambit of this definition. Compliance with the remaining requirements, however, is a much closer question. This section will focus on the existence of the requisite relationship to a congressional grant of authority—that is, whether there is a sufficient "substantive nexus" between the OFCCP regulations and an enactment of Congress that authorizes the regulations. Consideration of the procedural requirements will be deferred to section III.[22]

A. *The Executive Order as Authority for the Collection of Back Pay*

Executive Order 11246 contains an entire subpart delineating specific sanctions and penalties available to the Secretary of Labor for enforcement of the Order.[23] These enforcement tools include: (1) publication of the names of noncomplying contractors; (2) referral to the Department of Justice for appropriate enforcement; (3) referral to the

16. Pub. L. No. 88-352, 78 Stat. 241 (1964) (codified in various parts of 42 U.S.C.).

17. 5 U.S.C. §§ 551-559 (1976 & Supp. II 1978).

18. 441 U.S. 281 (1979) (a case arising under the Freedom of Information Act, 5 U.S.C. § 552 (1976 & Supp. II 1978)).

19. *Id.* at 301-03.

20. *Id.* at 302, quoting Morton v. Ruiz, 415 U.S. 199, 232 (1974).

21. For example, the $5.2 million settlement entered into by Uniroyal consisted "largely of back pay." DAILY LAB. REP. (BNA) 210 (Oct. 29, 1979).

22. *See* text accompanying notes 134-257 *infra*.

23. Subpart D of Exec. Order No. 11246, LAB. REL. REP. (BNA) LRX 2304-05.

Equal Employment Opportunity Commission (EEOC) or to the Department of Justice for investigation under Title VII; and (4) withdrawal of government contracts from a contractor until the contractor has satisfied the Secretary that it "has established and will carry out personnel and employment policies in compliance with the provisions of the Order."

The Secretary has advanced the withdrawal power, found in section 209(a)(6) of the Order[24] as one source of his regulatory power.[25] In *Uniroyal, Inc. v. Marshall*,[26] however, the court sustained the objection of Uniroyal, a government contractor, that a debarment order containing only the language of section 209(a)(6) was "unduly vague, violate[d] due process, and permit[ted] arbitrary and capricious action."[27] In response to the secretary's position that section 209(a)(6) granted to him the discretion to impose "unspecified substantive requirements,"[28] the court, holding such a broad interpretation of the language of section 209(a)(6) to be impermissible, stated that:

> [W]hatever may be the authority of the Secretary to impose substantive conditions upon a contractor who has been debarred for failing to comply with substantive non-discrimination provisions of the Executive Order, the Court concludes that he has no such authority where, as here, the contractor was debarred solely for failure to comply with discovery orders. *To construe the Executive Order, the regulations, and the Secretary's powers more broadly would raise serious problems of due process and would open the door wide to arbitrary action.* The government cannot bootstrap its way from the failure of a contractor to comply with a discovery order to the imposition of substantive affirmative action requirements. Further, *a party must be told more than that, in order to be removed from a government blacklist, it must satisfy an administrative official of its compliance with unknown, unspecified, and unpredictable conditions.*[29]

Therefore, while section 209(a)(6) may be a source of authority for the back pay regulations, any regulatory sanctions following from it must be limited to specific requirements that are imposed only for substantive

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24. Section 209(a)(6) provides as follows:
In accordance with such rules, regulations, or orders as the Secretary of Labor may issue or adopt, the Secretary of the appropriate contracting agency may:
. . . .
(6) Provide that any contracting agency shall refrain from entering into further contracts, or extensions or other modifications of existing contracts, with any noncomplying contractor, until such contractor has satisfied the Secretary that such contractor has established and will carry out personnel and employment policies in compliance with the provisions of this Order.

25. *See, e.g.*, Uniroyal, Inc. v. Marshall, 20 Fair Empl. Prac. Cas. 437 (D.D.C. 1979).

26. 20 Fair Empl. Prac. Cas. 437 (D.D.C. 1979).

27. *Id.* at 445. The case originated when the Secretary debarred Uniroyal for failing to comply with a discovery order issued in connection with a proceeding under Exec. Order No. 11246. *See* 41 C.F.R. §§ 30.9 to 60-30.11 (1979).

28. 20 Fair Empl. Prac. Cas. at 445 (D.D.C. 1979).

29. *Id.* (emphasis added).

violations. The type of bootstrap regulations that are currently in force arguably cannot pass this test.[30]

The Secretary also has claimed that the back pay regulations are authorized by section 201 of the Order, which provides as follows:

> The Secretary of Labor shall be responsible for the administration and enforcement of Parts II and III of this Order and shall adopt such rules and regulations and issue such orders as he deems necessary and appropriate to achieve the purposes thereof.[31]

The mere authorization to issue rules to implement the Order, however, is not sufficient to give those regulations the force and effect of law.[32] It still is necessary to establish a nexus between the regulations and some congressional delegation of authority.[33]

It is generally accepted that Executive Order 11246 is authorized by the broad grant of procurement authority vested in the Executive.[34] Within this broad grant, the social objectives of the Order have been rationalized on the basis that the government's interest in procurement is to see "that its suppliers are not over the long run increasing its costs and delaying its programs by excluding from the labor pool available minority workmen."[35] If this rationale is accepted, it is plainly inconsistent to assume that the back pay regulations, with their enormous impact on the contractors' costs and the resultant increase in the cost of supplies to the government, are within the scope of presidential action authorized by the procurement statutes.[36]

B. *The 1964 Legislative History of Title VII as Authority for the Back Pay Regulations*

Although Executive Order 11246 preceded the Civil Rights Act of

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30. Interestingly, the Secretary has stated that "[f]ailure to provide back pay relief would preclude the contractor from being reinstated under [section 209(a)(6)]." 44 Fed. Reg. 77,000, 77,000 (1979). Arguably, this language can be expanded to include back pay. However, under the pronouncement of the *Uniroyal* court, requirements of this type would have to be limited to instances in which a finding of discrimination has been made *and* back pay has been awarded.

31. LAB. REL. REP. (BNA) LRX 2301.

32. In Uniroyal, Inc. v. Marshall, 20 Fair Empl. Prac. Cas. 437, 440 (D.D.C. 1979), the District Court for the District of Columbia noted that § 201 grants broad authority to the Secretary. *See also* Contractors Ass'n of E. Pa. v. Secretary of Labor, 442 F.2d 159 (3d Cir.), *cert. denied*, 404 U.S. 854 (1971); AFL-CIO v. Kahn, 472 F. Supp. 88 (D.D.C. 1979), *rev'd*, 472 F. Supp. at 88 (D.C. Cir. 1979), *cert. denied*, 99 S. Ct. 3107 (1979).

33. *See* text accompanying notes 18-21 *supra*.

34. Contractors Ass'n of E. Pa. v. Secretary of Labor, 311 F. Supp. 1002 (E.D. Pa. 1970), *aff'd*, 442 F.2d 159 (3d Cir.), *cert. denied*, 404 U.S. 854 (1971); *cf.* Chrysler Corp. v. Brown, 441 U.S. 281 (1979) (questioning the validity of contractually implementing social programs but providing no answer to the question).

35. Contractors Ass'n of E. Pa. v. Secretary of Labor, 442 F.2d 159, 170 (3d Cir.), *cert. denied*, 404 U.S. 854 (1971).

36. For a more expansive analysis of the drawbacks of relying on the procurement power as the authority behind the back pay regulations, see Plaintiff's Memorandum in Support of Motion at 44-47, Harris Trust & Sav. Bank v. Marshall, 20 Fair Empl. Prac. Cas. 558, (N.D. Ill. 1979) (hereinafter *Harris Trust* Memorandum).

1964,[37] the legislative history of the Act reveals Congress' awareness of the existence of the Order and the limitations on the enforcement authority of the Order. Significantly, the original bill empowered the President to use his contracting powers to impose back pay. This approach was rejected, however, after numerous objections that a grant of the proposed powers to the President would "make the Executive branch of the Government the law makers, the judge, the jury and the executioner."[38]

The legislative history also leaves little doubt that Congress intended that all remedies, including back pay, would be imposed only through litigation in the federal courts. Congress gave the EEOC and individual plaintiffs power to seek redress for employment discrimination through litigation, but refused to grant the EEOC the authority to enforce any sanctions or to award any relief, except by voluntary agreement.[39] It thus is evident that, in 1963, Congress, cognizant of the enforcement authority already vested in the Executive through the procurement statutes, considered and flatly rejected Executive enforcement in the employment discrimination field.

C. *The Legislative History of the 1972 Amendments to Title VII as a Basis for the Regulations*

A proposal before the Senate in 1972 would have transferred all functions of OFCCP to the EEOC. In defeating this bill, opponents revealed that Congress understood the separate functions of the two agencies and recognized that the only remedy available under Executive Order 11246 was contract debarment.[40]

The comments of then EEOC Chairman Brown in his testimony before the Senate Labor Subcommittee further underscores the division of enforcement power. Regarding the proposed transfer of OFCCP functions, Brown commented:

> I can foresee serious problems arising as regards to investigations, remedies and open conflicts with provisions of Title VII . . . . For example, while an individual may sue under Title VII to have an individual grievance redressed, *under the provisions of the executive order the proper remedy is contract debarment not individual redress.* Also, the difference between the two remedies will probably necessitate different burdens of proof and differing emphasis on particular kinds of violations.[41]

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37. Pub. L. No. 88-352, 78 stat. 241 (1964) (codified in various parts of 42 U.S.C.).

38. *Hearings on S. 1731 and S. 1750 Before the Senate Comm. on the Judiciary*, 88th Cong., 1st Sess. 327, 331, 335, 342 (1963); *Hearings Before the Subcomm. No. 5 of the House Comm. on the Judiciary*, 88th Cong., 1st Sess. 114-18, 1476-84 (1963). For a more detailed discussion of this area, see *Harris Trust* Memorandum, *supra* note 36.

39. 42 U.S.C. § 2000e-5 (1976).

40. For example, the supporters of the bill stated: "[T]he compliance program will be greatly strengthened if alternative remedies are made available. *The only remedy currently available to the OFCC is contract debarment.* . . ." 117 CONG. REC. 31961 (1971) (emphasis added).

41. 118 CONG. REC. 1393 (1972) (emphasis added).

The legislative history of the 1972 amendments also reveals Congress' grave concern over due process requirements, a concern that ultimately led to the defeat of an amendment that would have empowered the EEOC to issue cease and desist orders. There were three primary reasons for the refusal:

> First, the Federal Court enforcement would provide the essential safeguards of due process and an impartial tribunal thereby avoiding any biased findings by a zealous agency charged with one particular goal. Second, Court enforcement would allow use of the judicial expertise built up in years of resolving similar complex questions. Third, allowing retrospective remedies such as back pay to be sought only in judicial proceedings would avoid the abrogation of due process rights of the defendant occasioned by merger of judicial, prosecutorial and investigatory functions in a single administrative agency.[42]

The legislative history of the 1972 amendments thus neither supports an assertion that substantive power has been delegated to the President, nor does it substantiate the Secretary's assertion of broad power to promulgate the back pay regulations. Indeed, because Congress, through the 1972 amendments, expressed a firm conviction to deny the delegation of such power both to the Executive and to any administrative agency created by congressional design, the legislative history leads to a contrary conclusion. More importantly, the congressional insistence that any determination of retrospective remedies for employment discrimination, including back pay, be made by the courts highlights Congress' awareness of the separation of powers in this area.

D. *The Back Pay Regulations and Due Process Considerations*

Even if the necessary legislative grant of authority were established, the back pay regulations must be examined in light of the due process protections afforded by the Constitution.[43] The only case that, to date, has

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42. *Harris Trust* Memorandum, *supra* note 36 at 36 (citations omitted). Other strong evidence of the concern of Congress in maintaining constitutional due process protections are noted in this Brief.

43. Senator Brock's statements during the debates regarding the proposal to give EEOC cease and desist powers underscore the importance of due process considerations in the context of this Article:

> Mr. President, this nation was founded on the philosophy of due process of law. A man accused must be given the right to go before a jury of his peers and plead his case—and be judged by his neighbors, right or wrong.
>
> Today we are debating legislation that threatens to undermine this very philosophy.
>
> The Equal Employment Opportunity bill actually allows this regulatory commission to put agents into the field who have the authority to go into a small business and say "Mr., I don't like what you are doing, it is discrimination, you are guilty, you are fined and don't bother to plead innocent because there is no appeal, my decision is final."
>
> If we allow this legislation to pass with this authority, we will be creating a commission that will send bureaucrats, who have been elected by no one, out to serve as policemen, judge, jury, and prosecutor, all rolled into one.
>
> No judge or jury, just a bureaucrat with the power to judge and destroy.
>
> This uncontrollable regulatory authority in the EEOC bill is a violation of every tenet of America. There is simply no excuse for Congress to delegate this kind of raw power to this agency.
>
> The Federal Government does not have the right to say to Americans, under any

addressed this question, *Harris Trust and Savings Bank v. Marshall*,[44] is inconclusive. In *Harris Trust*, OFCCP had conducted several reviews of the bank's affirmative action program and had notified the bank that it was not in compliance with Executive Order 11246. Shortly thereafter, OFCCP filed an administrative complaint against the bank, alleging various discriminatory employment practices and praying for an order "(1) enjoining [the bank] from failing and refusing to comply with the Order and the Regulations (and in particular . . . from failing to make compensatory payments, i.e., back pay, to female and minority group employees who had been discriminated against in the past . . .); and (2) cancelling all of [the bank's] government contracts."[45] The bank responded by questioning the constitutionality of the prayer for back pay, but the administrative law judge refused to consider the issue on "the ground that he did not have the power to decide statutory and constitutional issues."[46] The bank, in an effort to obtain a resolution of the back pay issue, filed in federal court for declaratory and injunctive relief restraining OFCCP from enforcing its back pay regulations. The district court refused to rule on the constitutional challenge to the administrative regulations, however, because, in its view, the issue was "not yet ripe for review."[47]

Thus, the court failed to find a justiciable issue in the only case in which back pay relief under the Order has come under attack, and the constitutionality of the regulations remains an open issue in the courts. Because the Civil Rights Act of 1964[48] contains analogous provisions, however, some guidance can be gleaned from back pay cases decided under that statute.

1. *Due Process Under Title VII*

Section 2000-(f)(3) of the Civil Rights Act of 1964, which grants to the

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circumstances, that "you are guilty until proven innocent—and you have no appeal."

Mr. President, I urge my colleagues to support the Dominick amendment which removes this regulatory power from the bureaucracy and puts it where it should be, with the court.

44. 20 Fair Empl. Prac. Cas. 558 (N.D. Ill. 1979). Two other cases have dealt with the right of OFCCP to seek back pay for individuals *in court*. United States v. Lee Way Motor Freight, Inc., 20 Fair Empl. Prac. Cas. 1345 (10th Cir. 1979) (reversing and remanding without expressing an opinion on the district court's original ruling that the government—in this case both the Department of Justice and EEOC—lacked the power to bring a back pay action on behalf of individual employees); United States v. Duquesne Light Co., 423 F. Supp. 507 (W.D. Pa. 1976) (holding that the Department of Justice has power to bring an action in federal court for back pay under Exec. Order No. 11246).

45. 20 Fair Empl. Prac. Cas. at 559-60.

46. *Id.* at 560.

47. *Id.* Although OFCCP had sought enforcement of its back pay regulations in the administrative complaint, the ALJ had not issued a decision awarding back pay. The court, therefore, ruled that the issue was "not appropriate for judicial resolution." *Id.* at 561. The Seventh Circuit refused to reach the merits of a contractor's challenge to the OFCCP's discovery regulations. Uniroyal Inc. v. Marshall, 579 F.2d 1060 (7th Cir. 1978). Whether the conclusion reached by these courts was correct is beyond the scope of this Article.

48. Pub. L. No. 88-352; 78 Stat. 241 (1964). The substantive provisions of the Act, as amended by later legislation, are codified in 42 U.S.C. §§ 2000a to 2000h-6 (1976 & Supp. II 1978). All further references to the Act will be to the codified provisions.

federal district courts jurisdiction of actions brought under Title VII,[49] guides the courts in fashioning remedies for employment discrimination through the following language:

> If the court finds that the respondent has *intentionally engaged or is intentionally engaging in an unlawful employment practice charged in the complaint*, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay, . . . or any other equitable relief as the court deems appropriate. Interim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the back pay award otherwise allowable. No order of the court shall require . . . the payment to him of any back pay, if such individual was refused . . . employment or advancement or was suspended or discharged *for any reason other than discrimination on account of race, color, religion, sex, or national origin.*[50]

In exercising their discretion under this section, the courts have made it clear that a back pay award[51] will not be forthcoming automatically; rather, the complaining employee must affirmatively establish that such an award is appropriate. In *McDonnell Douglas Corp. v. Green*,[52] the Supreme Court set forth the proper nature and order of proof that must be established by a Title VII plaintiff, holding that although the complainant has the initial burden of establishing a prima facie case of employment discrimination violative of the Act,[53] once this prima facie case is proven, the burden "must shift to the employer to articulate some legitimate

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49. 42 U.S.C. § 2000e-5(f)(3) (1976) provides as follows:
(3) Each United States district court and each United States court of a place subject to the jurisdiction of the United States shall have jurisdiction of actions brought under this subchapter. Such an action may be brought in any judicial district in the State in which the unlawful employment practice is alleged to have been committed, in the judicial district in which the employment records relevant to such practice are maintained and administered, or in the judicial district in which the aggrieved person would have worked but for the alleged unlawful employment practice, but if the respondent is not found within any such district, such an action may be brought within the judicial district in which the respondent has his principal office. For purposes of sections 1404 and 1406 of Title 28, the judicial district in which the respondent has his principal office shall in all cases be considered a district in which the action might have been brought.

50. 42 U.S.C. § 2000e-5(g) (1976) (emphasis added).

51. The back pay provisions of Title VII litigation were not new to employment cases. In fact, the provisions were "modeled on the back pay provision of the National Labor Relations Act." Albemarle Paper Co. v. Moody, 422 U.S. 405, 419 (1975).

52. 411 U.S. 792 (1973). Although the *Albemarle* Court weakened this statement by stating that "given a finding of unlawful discrimination, back pay should be denied for reasons which . . . would not frustrate the central statutory purposes. . . ." 442 U.S. at 421, subsequent decisions have established that an employee must establish his or her entitlement to back pay.

53. 411 U.S. at 802. According to the Court, the burden is satisfied if the employee shows
(i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications.
Id. (footnotes omitted).

nondiscriminatory reason" for its discriminatory treatment of the complainant.[54] In rebuttal, the complainant must then be given an opportunity to show that "the presumptively valid reasons" advanced by the employer may have been "in fact a coverup for a . . . discriminatory decision."[55]

Once a finding of discrimination is made, the role of the judiciary becomes crucial since the courts are then charged with exercising their "equitable powers to fashion the most complete relief possible," to effect the purposes of the Act.[56] For example, in *Franks v. Bowman Transportation Co.*,[57] which concerned a request for an adjustment of the seniority status for individuals who had proved a discriminatory hiring pattern by the employer, the Supreme Court emphasized the discretionary role of the courts when they analyzed the "make whole" purpose of Title VII.[58] While holding that the judicial denial of seniority relief in such an instance was permissible "only for reasons which, if applied generally, would not frustrate the central statutory purposes"[59] of the Act, the Court warned: "We are not to be understood as holding that an award of seniority status is requisite in all circumstances. The fashioning of appropriate remedies invokes the sound equitable discretion of the district court."[60] Concluding that class-based seniority adjustment was a proper form of relief under Title VII, the Court reaffirmed the fact that there may be cases under Title VII that call for "one remedy but not the other," and that "these choices are of course left in the first instance to the district courts."[61]

These principles were refined by the Supreme Court in *International Brotherhood of Teamsters v. United States*,[62] a case in which a pattern of

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54. *Id.* at 802. In *McDonnell* the complainant's participation in the unlawful conduct against the employer was sufficient evidence "to meet the prima facie case . . ." *Id.* at 804.

55. *Id.* at 805. The same requirements attach to class actions, whether brought by individuals or by the EEOC. The requirements for class actions are particularly significant, for both Exec. Order 11246 and the regulations are designed to provide relief for "affected" classes. *See*, e.g., 41 C.F.R. § 60-1.33 (1979).

56. Franks v. Bowman Transp. Co., 424 U.S. 747, 764 (1976).

57. 424 U.S. 747 (1976).

58. The Court then noted that since the individuals had "carried their burden of demonstrating the existence" of the discriminatory practice, the burden would then be upon the employer to prove that the individuals were not in fact victims of previous hiring discrimination. *Id.* at 772. "Only if this burden is met may retroactive seniority—if otherwise determined to be an appropriate form of relief under the circumstances of the particular case—be denied individual class members." *Id.* at 773. It must be noted that the Court not only outlined the type of evidence that could be adduced by the employer in rebuttal, but noted that the victim, rather than the perpetrator of the alleged act, should bear the burden of proving what his job performance would have been but for the discrimination. *Id.* at 773, n.32.

59. *Id.* at 771, quoting Albemarle Paper Co. v. Moody, 422 U.S. 405, 421 (1975).

60. *Id.* at 770.

61. *Id.* at 779, citing Albemarle Paper Co. v. Moody, 422 U.S. 405, 416 (1975). *See also* Hazelwood School Dist. v. United States, 443 U.S. 299 (1977) (discussing the proper order of proof in Title VII cases).

62. 431 U.S. 324 (1977).

discrimination against minorities had been established[63] and in which the only question was whether retroactive seniority was an appropriate remedy for pre-Act discrimination.[64] After reviewing the legislative history of the Act,[65] the Court concluded that such relief was not available when there was a "bona fide" seniority system in effect prior to the Act, even though the seniority system may have caused discrimination. In detailing the basis for relief on remand to the district court, the Supreme Court discussed "questions relating to the appropriate measure of individual relief" in "pattern or practice" actions.[66] Relying on its earlier decision in *McDonnell Douglas*, the Court reasserted that "an individual Title VII complainant must carry the initial burden of proof by establishing a prima facie case of racial discrimination."[67] Noting the differences between the "liability" and the "remedial" stages of a pattern or practice suit,[68] the Court emphatically pointed out that "the question of individual relief does not arise until it has been proved that the employer has followed an employment policy of unlawful discrimination."[69] The Court elaborated further:

> At the initial, "liability" stage of a pattern-or-practice suit the Government is not required to offer evidence that each person for whom it will ultimately seek relief was a victim of the employer's discriminatory policy. *Its burden is to establish a prima facie case that such a policy existed.* The burden then shifts to the employer to defeat the prima facie showing of a pattern or practice by demonstrating that the Government's proof is either inaccurate or insignificant.[70]

According to the Court, if the employer fails to rebut the government's prima facie case, the court can conclude that a violation has occurred and can then proceed to determine the appropriate relief.[71] The Court specifically noted that "[w]ithout any further evidence from the Government, a court's finding of a pattern or practice justifies an award of *prospective relief*."[72] Significantly, the Court also noted that proof in the

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63. The Court noted that the EEOC had carried its burden of proof and that the employer had failed to rebut it. *Id.* at 337-40.

64. The Court reasserted that its earlier decision in Franks v. Bowman Transp. Co., 424 U.S. 747 (1976), had established the availability of retroactive relief for post-Act discrimination. 431 U.S. at 346.

65. In particular the Court was concerned with § 703(h) of Title VII, 42 U.S.C. § 2000e-2 (1976), which provides in part as follows:

> Notwithstanding any other provisions of this subchapter, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority . . . system, . . . provided that such differences are not the result of an intention to discriminate because of race . . . or national origin. . . .

66. 431 U.S. at 357.

67. *Id.*

68. *Id.* at 360-62.

69. *Id.* at 361.

70. *Id.* at 360 (emphasis added).

71. *Id.* at 361.

72. *Id.* (emphasis added).

liability stage was not sufficient to establish individual relief: "When the Government seeks individual relief for victims of the discriminatory practice, a district court *must usually conduct additional proceedings* after the liability phase of the trial to determine the scope of individual relief."[73] The ultimate task in pattern or practice cases will be to strike a balance "between the statutory rights of victims and the contractual rights of nonvictim employees. That determination is best left, in the first instance, to the sound equitable discretion of the trial court."[74]

The use of Title VII precedent to analyze issues raised under Executive Order 11246 finds support in the recent decision of *United States v. Trucking Management, Inc.*[75] In *Trucking Management*, the district court flatly rejected the contention that the seniority system declared lawful and bona fide by the *Teamsters* Court under Title VII was unlawful under Executive Order 11246. The government, as plaintiff,[76] advanced the theory that "the obligations on government contractors under the Executive Order are above and beyond those imposed on employers by Title VII because the Executive Order contains no provision [that immunizes bona fide seniority plans] . . . ."[77] In rejecting the government's theory, the court stated: "It is not for this court to run afoul of the statutory construction of Title VII or the will of Congress. And nothing in Executive Order 11246, its accompanying regulations and history, or other legal precedents supports such a course."[78] The *Trucking Management* court reviewed the history and purposes of the Order, emphasizing the need to enforce the Order "within the framework of Congress' legislative will."[79] It further stated that the executive branch cannot exercise its derivative authority "in a manner inconsistent with the implied or expressed will of Congress,"[80] and held that an adoption of the government's contention and interpretation of the Order "would run afoul of the statutory construction of Title VII and legislative intent of Congress as pronounced

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73. *Id.* (emphasis added). According to the Court, an individual may show that he is entitled to the relief, by, *inter alia*, proving that he possessed the requisite qualifications and that he applied for a particular job. However, the burden of proof at this stage is on the employer. *Id.* at 362.

74. *Id.* at 376 (footnotes omitted).

75. 20 Fair Empl. Prac. Cas. 342 (D.D.C. 1979), *appeal docketed*, C.A. No. 74-453 (D.C. Cir. Sept. 18, 1979).

76. The Action was brought by the United States and the EEOC against several unions and trucking companies.

77. 20 Fair Empl. Prac. Cas. at 346. The court noted that a similar argument had been made in EEOC v. East Texas Motor Freight Systems, Inc., 564 F.2d 179 (5th Cir. 1977). The reply in *East Texas* was clearly contrary to the government's position:

> This is an argument never made until after the Teamsters decision.
>
> The argument cannot be accepted because Congress has declared for a policy that a bona fide seniority system shall be lawful. The Executive may not, in defense of such policy, make unlawful—or penalize—a bona fide seniority system.

Id. at 185 (citations omitted).

78. 20 Fair Empl. Prac. Cas. at 347.

79. *Id.* at 348.

80. *Id.*

by the Supreme Court, and as such would violate the doctrine of separation of powers and vitiate the holding of *Teamsters*."[81]

In *Illinois Tool Works Inc. v. Marshall*,[82] one of the latest in a series of cases[83] striking down OFCCP's "passover" procedures,[84] the Seventh Circuit appeared to apply due process considerations to certain OFCCP regulations by holding that the passover regulations were "invalid because they permitted debarment without a hearing and therefore were inconsistent with section 208(b) of the Order."[85] The court, however, failed to find the same infirmity with the regulation that provides that a contractor is not in noncompliance as long as he has an "affected class"[86] because, in its view, a hearing on the merits is necessary to determine whether a contractor actually has an affected class problem.[87] On the other hand, under the passover regulation a contractor could be debarred without a hearing merely because OFCCP had made a prima facie determination of noncompliance.[88] The court differentiated the passover regulation from the "show cause" regulation because the latter, without more, did not debar contractors from receiving government contracts.[89] Significantly, the district court had upheld the government's right to publish and disseminate a list of contractors alleged to be in noncompliance, a different list from the "nonawardable" list it had struck down.[90] The Seventh Circuit reversed, stating that this listing, like a listing of "nonawardable contractors," could "be a sanction tantamount to debarment" and was allowable "only after hearing on the merits."[91] The

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81. *Id.* at 348-49.

82. 601 F.2d 943 (7th Cir. 1979).

83. *See* comments by Elisburg at Conference, Daily Lab. Rep. (BNA) (No. 216) A-4 (Nov. 6, 1979).

84. 41 C.F.R. § 60-2.2(b) (1979). The regulation has been amended to reflect the nearly unanimous court decisions striking down the regulation.

85. 601 F.2d at 947. Section 208(b) provides:

> The Secretary of Labor may hold, or cause to be held, hearings in accordance with Subsection (a) of this Section prior to imposing, ordering, or recommending the imposition of penalties and sanctions under this Order. No order for debarment of any contractor from further Government contracts under Section 209(a)(6) shall be made without affording the contractor an opportunity for a hearing.

LAB. REL. REP. (BNA) LRX 2304.

86. 41 C.F.R. § 60-2.1(b) (1979) provides:

> Relief, including back pay where appropriate, for members of an affected class who by virtue of past discrimination continue to suffer the present effects of that discrimination, shall be provided in the conciliation agreement entered into pursuant to § 60-60.6 of this title. An "affected class" problem must be remedied in order for a contractor to be considered in compliance. Section 60-2.2 herein pertaining to an acceptable affirmative action program is also applicable to the failure to remedy discrimination against members of an "affected class."

87. 601 F.2d at 948.

88. The court reached this conclusion because of the action of the government in publishing Illinois Tool Works' name in a public list of "nonawardable" contractors. The publication effectively prevented Illinois Tool Works from being awarded a previously negotiated Navy contract. *Id.*

89. *Id.*

90. *Id.*

91. *Id.* at 949.

court held that section 208, which provides for hearings prior to enforcement,[92] and section 209, which lists sanctions and penalties,[93] "should be construed together."[94]

2. *The Implementation of the Back Pay Regulations*

OFCCP recently published its Contractor Compliance Manual,[95] which, according to the introductory section, contains "the policies and procedures for enforcing the rules and regulations issued pursuant to the Order." Although not published pursuant to the Administrative Procedure Act,[96] the Manual, which is the primary source of OFCCP policies and procedures, includes an entire chapter outlining the process by which retrospective relief may be determined by an equal opportunity specialist (EOS).

Chapter 7 of the Manual, entitled "Identification and Resolution of Affected Class Problems under Executive Order 11246," states that the Manual's purpose is "to provide the EOS with a suggested analytical framework for identifying and substantiating systemic discrimination, and suggested methods for identifying affected class[es] and fashioning remedies."[97] A salient feature of this chapter is its emphasis upon both statistical analyses and salary comparisons. According to the Manual, statistical analysis is the primary, though not exclusive, tool for identifying systemic discrimination.[98] Salary comparisons, another tool for identifying affected classes, is best exemplified by what OFCCP has termed "cohort analysis."[99] The basic procedure of cohort analysis is to examine the contractor's treatment of employees with similar characteristics, such as education, experience, and similar initial hire dates, and then to compare the employees' current salaries. When the comparison shows that

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92. Section 208(a) provides as follows:

> The Secretary of Labor, or any agency, officer, or employee in the executive branch of the Government designated by rule, regulation, or order of the Secretary, may hold such hearings, public or private, as the Secretary may deem advisable for compliance, enforcement, or educational purposes.

LAB. REL. REP. (BNA) LRX 2304. For the text of § 208(b), *see* note 85 *supra.*

93. *See* note 24 *supra.*

94. 601 F.2d at 949.

95. OFFICE OF FEDERAL CONTRACT COMPLIANCE PROGRAMS, CONTRACTOR COMPLIANCE MANUAL [hereinafter cited as Manual].

96. 5 U.S.C. §§ 551-559 (1976 & Supp. II 1978). Because it was not published in accordance with the Administrative Procedure Act, the Manual is not entitled to the deference given regulations. *See* text accompanying notes 18-19 *supra. See also* In the matter of OFCCP v. Firestone Tire & Rubber Co., Daily LAB. REP. (BNA) (No. 109) D-1 (June 4, 1980) (recommended decision of ALJ), *rev'd,* Decision and Final order of the Sec'y of Labor, U.S. Dept. of Labor OFCCP v. Firestone Tire & Rubber Co., DAILY LAB. REP. (BNA) (No. 137) E-1 (July 15, 1980). The ALJ held that Technical Guidance Memo No. 1, a policy directive issued by OFCCP in February, 1974, is a substantive rule but "does not have the force and effect of low nor the authority of a duly promulgated administrative regulation" because it was not published in accordance with the APA. This holding was specifically recycled by the Secretary of Labor in his decision and final order.

97. Manual § 7-10.

98. *Id.*

99. *Id.* at § 7-40.4(d).

white males are generally in higher paying classifications than females and minorities, a presumption of discrimination arises.[100]

Other analyses that are provided as alternatives to the "cohort analysis" likewise will lead to the identification of problem areas, mostly identifiable in terms of salary differentials. For example, one section entitled "Salary distribution" compares "the number and percentage of minorities and women in each salary group to concentrations and relative position within the workforce."[101] Regardless of the method used, if any one or more of these analyses shows problems, "then there is a strong indication of systemic discrimination."[102]

If the initial comparisons suggest systemic discrimination, the Manual instructs the EOS to test the hypothesis by using the following procedures:

(1) Determining whether there has been a loss of income;
(2) Comparing average or median wage or salary for minorities and women in areas of concentration with the average and median wage or salary for non-minorities and/or men in areas of underrepresentation;
(3) Determining earnings potential in areas of high concentration;
(4) Determining whether areas of concentration afford less desirable work schedules; and
(5) Comparing work schedules to determine whether high concentration areas have less job security and poorer working conditions.[103]

If there are reasons to presume the existence of systemic discrimination, the EOS must examine "possible explanations for the evidence of discrimination." The EOS then must give the contractor an opportunity to "rebut, explain, or justify apparent discrimination" and, in analyzing these explanations, must take the possible effects of present and past discrimination into account.[104] Moreover, the Manual provides that the EOS must eliminate seniority or job related qualifications as explanations for concentrations,[105] and instructs the EOS to verify his or her

100. For example, § 7-40.5(b) of the Manual states:
"If a cohort analysis or a frequency distribution shows a severe concentration of women at the lower end of the salary scale, whereas men are distributed throughout, then the EOS might hypothesize that there are assignment, promotion, and/or training problems."

101. Manual § 7-40.4(e)(1).

102. Manual § 7-40.5(c). Interestingly, this section uses language indicating the creation of a *presumption* rather than a *conclusion.*

103. Manual § 7.40-6. The term "underrepresentation" is a term of art used throughout the Manual and the OFCCP regulations. It is defined in the Manual's glossary of terms at § 1-60.103 as follows:
Underutilization. Employment of members of a race, ethnic, or sex group in a job or job group at a rate below their availability. The concept of underutilization includes any numerical disparity, and is not limited by the 80% rule applicable to concepts such as adverse impact. Underutilization for contractors subject to 41 CFR Part 60-2 is determined by conducting a job group analysis according to 41 CFR 60-2.11(b).

104. Manual § 7.40-6.

105. *Id.* at § 7-40.7. OFCCP challenges of past discrimination remain vigorous notwithstanding

"conclusion of systemic discrimination and the existence of an affected class" through record sampling.[106]

After sufficient documentation has been obtained, the Manual provides that the EOS "should formulate conclusions about the nature of the systemic discrimination that appears to have created an affected class."[107] Thereafter, the EOS should identify the membership in the affected class, considering incumbent employees, applicants, former employees and retired employees.[108]

The Manual then instructs the EOS to formulate affected class remedies and provide guidance and examples. The parameters of the remedy are to be measured by "the extent to which affected class members have fallen behind non-class employees and are suffering economic or other loss."[109] The amount of economic loss is estimated by "determining the loss suffered by that portion of the affected class which, but for the discrimination and/or failure to remedy the effects of past discrimination, should have been afforded opportunities offering greater economic advantage."[110]

The Manual contains the following instructions concerning back pay computation:

> Back pay computation. Computing the back pay due affected class members can be complicated. However, two broad principles always apply. Unrealistic exactitude is not required, and uncertainties in determining what would have been earned but for discrimination must be resolved in favor of the victim. The key is to avoid unfairly excluding discriminatees by defining the class or the determinants of the award too narrowly.
>
> The method of computation will depend on the complexity of the case. If the class is small and the discrimination is clear, fairly precise determinations are normally possible by hypothetically reconstructing each discriminatee's work history. However, where the class size, ambiguity of promotion or hiring practices, multiple effects of discriminatory practices, or length of time over which the determination occurred creates a multitude of hypothetical judgments, a classwide approach to the computation of back pay may be appropriate.
>
> All back pay awards are based on estimates of the difference between the income affected class members would have received during the back pay period, if there had not been discrimination, and/or its continuing effects, and the income they actually received.[111]

There are a number of methods provided for computing back pay liability. One method is an averaging formula, which requires the EOS to

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Teamsters, see text accompanying notes 62-74 *supra,* and *Trucking Management, see* text accompanying notes 75-81 *supra.* OFCCP maintains that *Teamsters* does not apply to it and has taken an appeal from *Trucking Management, see* 44 Fed. Reg. 77,000-01 (1979).

106. Manual § 7-40.8.

107. *Id.* at § 7-40.9.

108. *Id.* at § 7-40.10.

109. *Id.* at § 7-50.

110. *Id.* at § 7-50.2.

111. *Id.* at § 7-130.2.

determine the difference between the average rate of pay received by those employees in the group from which the affected class was excluded and the average rate received by each member of the affected class during the relevant period.[112] A second method is the representative employee earnings formula, which is described in the Manual as follows:

> Approximations are based on a group of employees who were not injured by the pattern and practice of discrimination, and who are comparable in ability, seniority, and numbers. Affected class members are awarded the difference between the earnings of such comparable employees during the pay period and their own earnings.[113]

A final method is the pro rata share formula, which is based upon a computation of the contractor's total liability—the average economic loss times the number of additional vacancies that affected class members would have filled but for the discrimination—pro-rated over the entire class.[114]

After computing back pay liability, the EOS must proceed to conciliation.[115] In attempting to negotiate a conciliation agreement,[116] the Manual requires that the EOS "endeavor to have the contractor admit the violation(s) set forth in . . . the conciliation."[117] As stated earlier, failure to resolve the deficiencies will lead OFCCP to recommend enforcement proceedings.[118]

3. *Applicability of the Title VII Principles to the Implementation of the Back Pay Regulations*

In order to determine whether a contractor is in compliance with

112. *Id.* at § 7-103.2(c)(1).

113. *Id.* at § 7-130.2(c)(2).

114. *Id.* at § 7-130.2(c)(3).

115. Both Exec. Order No. 11246 and the regulations require an attempt at conciliation. *See* text accompanying note 10 *supra.*

116. Section 8-110.1(a) of the Manual points out that an agreement is necessary.

117. Manual § 8.130.2(c).

118. Manual § 8-170.1(a). 41 C.F.R. § 60-1.26(a)(2) (1979), as amended by 45 Fed. Reg. 927Z (January 1, 1980), provides that OFCCP's director, or his designee, may refer the matter to the Solicitor of labor for the institution of appropriate enforcement proceedings to enjoin the violations, to seek appropriate relief (including back pay), or to impose sanctions.

The regulations also provide an alternate route to enforcement proceedings. Under this method the contractor must comply with the recommendations of the Director. Then request a hearing and review of the action alleged to be erroneous. The hearing must be requested within 10 days of "compliance." 41 C.F.R. § 60-1.24(c)(4) (1979). According to the Manual in the case of compliance by executing a conciliation agreement, this 10 day time period begins upon the contractor's receipt of the signed copy from the OFCCP Officer approving the agreement. Manual § 8-130.6(g)(1). Neither the Manual nor the regulations address themselves to the question of whether the request for a hearing nullifies, or at least delays, the effectiveness of the agreement, although this is presumably the result.

Query, whether such a procedure, even though staying the terms of the agreement, would nevertheless expose the contractor to a deluge of individual Title VII claims by the alleged members of the affected class based upon the deficiencies asserted by OFCCP. For this reason alone, the writers doubt the practicality of the alternative. Interestingly, OFCCP's recently published proposed regulations indicate that this alternative may be eliminated in the future, or if retained, will involve a record hearing before an OFCCP official, rather than a hearing before an ALJ with live testimony. 44 Fed. Reg. at 77,007 (1979).

Executive Order 11246, OFCCP necessarily must review a contractor's adherence to the equal employment opportunity and affirmative action requirements of the Order.[119] In conducting this review, the OFCCP, as an investigatory and enforcement agency, arguably is empowered to gather data that could present a prima facie case of unlawful discriminatory practices. Establishing a prima facie case in this manner is consistent with *McDonnell Douglas, Franks*, and *Teamsters*, since in order to impose sanctions under section 209 of the Order, such violations must be established at an adjudicatory proceeding.

According to the *Teamsters* Court, however, proof of a prima facie case is only the first step in the "liability" stage of a pattern or practice suit.[120] The burden then shifts to the employer to articulate some legitimate nondiscriminatory reason for its action, and ultimately the court is faced with the difficult task of striking a balance of the equities.[121] By instructing the EOS to permit rebuttal by the contractor, the Manual gives the employer an opportunity to explain its actions.[122] It can be argued, however, that the EOS is not an impartial judge since the Manual also reminds the EOS that the possible effects of both present and past discrimination must be taken into account and that seniority and job qualifications must be eliminated as explanations.

This lack of impartiality inherent in the Manual makes it apparent that a prima facie case will rarely, if ever, be effectively rebutted, particularly when the explanations hinge on a bona fide seniority system, legitimate job qualifications, or both. Moreover, it is absurd to think that the EOS could, or indeed should, act as an impartial trier of fact in assessing the rebuttal evidence presented by the contractor, given the fact that, in practice, an adversarial relationship develops between the EOS and the contractor, and, more importantly, that it was the EOS who concluded that the contractor had discriminated in the first instance. It is evident that in enacting Title VII and, indeed, other employment related legislation such as the National Labor Relations Act, Congress was aware that the role of assessing a contractor's rebuttal evidence belongs to the judiciary or, at the very least, to an impartial quasi-judicial body such as the National Labor Relations Board (NLRB). Nothing in Executive Order 11246 permits less in cases of alleged violations of the Order. Nonetheless, because the EOS becomes the judge, the "liability" stage is effectively concluded once a prima facie case is established, notwithstanding the principles laid down by the Supreme Court in *Franks* and *McDonnell Douglas*. Thus, the Manual fails to observe the difference between the liability stage and the remedial stages of a discrimination case.

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119. *See* text accompanying notes 7-8 *supra*. If an affirmative action program is required, a compliance review should, and under the regulation does, include review of the employer's affirmative action program as well. *See* 41 CFR § 60-1.20(a) & 60-1.40(c), (1979).

120. *See* text accompanying notes 62-74 *supra*.

121. *Id.*

122. *See* text accompanying note 104 *supra*.

Even assuming *arguendo* that the prima facie case established by the EOS cannot be rebutted, the *Teamsters* Court emphatically noted that, without more evidence, only a prospective remedy can follow from such proof. Nevertheless, in practice the OFCCP totally ignores the liability stage, since the EOS not only fails to conduct additional proceedings to determine the scope of individual relief in accordance with *Teamsters*, but, in effect, fashions a *retroactive* remedy from evidence that could justify at most only a prospective remedy.[123] Neither the Order nor the congressional delegation of power authorizes this abrogation of the role of the judiciary in fashioning remedies that, by their very nature, must be left to the sound equitable discretion of the courts.[124]

The implementation of the back pay regulations also raises another problem. The regulations describe an affirmative action program as a "set of specific and result-oriented procedures to which a contractor commits himself to apply every *good faith effort*."[125] In this vein, the Ninth Circuit, in *Legal Aid Society v. Brennan*,[126] stated: "[T]he goals [of an affirmative action program] remain only 'targets reasonably attainable by means of applying every good faith effort' by the contractor. . . . Compliance is measured by good faith efforts to attain them, not by whether they are realized."[127] The back pay policy as implemented by OFCCP does not recognize the existence of this standard. The only reference to "good faith" in chapter 7(3) of the Manual is in a paragraph dealing with "good cause" as a possible explanation for a presumptive discriminatory practice.[128] This leads to the inescapable conclusion that "good faith efforts" plainly will not be sufficient to avoid the imposition of back pay. The *McDonnell Douglas* requirement that the employer be given the right to "articulate some legitimate nondiscriminatory reason"[129] is eliminated. While good faith efforts arguably would not be sufficient to rebut evidence of discrimination, a court of law, in the exercise of its equitable powers, could take into consideration such efforts in mitigating back pay liability. The abrogation by OFCCP of judicial powers, however, leaves no room for the exercise of the equitable discretion that is vested in the courts.

Even if the regulations had the appropriate nexus to a legislative grant

123. A compliance review not only involves a "desk audit" of the contractor's affirmative action program, but also an "on-site" review. Often during the on-site review additional data is gathered for off-site analysis. It is only after the analysis, including back pay computations, *see* text accompanying notes 111-14, *supra*, is completed that an "exit" conference with the contractor is held and OFCCP's final conclusions are communicated to the contractor. *See* Manual § 3-180.

124. *See* Mitchell v. Mid-Continent Spring Co., 583 F.2d 275 (6th Cir. 1978), in which the court remanded a case to the district court for individual hearings on remedies.

125. 41 C.F.R. § 60-2.10 (1979) (emphasis added).

126. 608 F.2d 1319 (9th Cir. 1979), *cert. denied sub. nom.* Chamber of Commerce v. Legal Aid Society, 23 Empl. Prac. Dec. (CCH) ¶ 30,977 (1980).

127. *Id.* at 1342.

128. " 'Good cause' is different from 'good faith efforts.' 'Good faith efforts' may excuse a contractor from failing to meet a goal or save it from sanctions, but would not necessarily exonerate it from the requirements of the law involved." Manual § 8-30.6(b).

129. McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973).

of authority, it is nevertheless apparent that the collection of back pay in extra-judicial[130] proceedings violates every tenet of constitutional due process principles. The abrogation of judicial power by the Executive is not contemplated by the Order and constitutes an impermissible exercise of regulatory power. It must be noted that, unlike NLRB cases, in which the NLRB must resort to the courts for enforcement of its orders,[131] OFCCP determinations are self-executing. Indeed, other sanctions, including debarment, may well be instituted for failure to comply with OFCCP's back pay demands even during the pendency of administrative proceedings before an administrative law judge. Similarly, unlike NLRB back pay proceedings, which are the subject of published rules that require the issuance of detailed, complete specifications,[132] the amounts allegedly due under OFCCP proceedings are subject to "secret" formulations and are not ultimately determined pursuant to a hearing before an impartial third party. The fears that Senator Brock expressed during the Congressional debates in 1972 have indeed materialized in the name of OFCCP, which has turned its agents into "policemen, judge, jury, and prosecutor, all rolled into one."[133]

III. ADMINISTRATIVE PROCEDURE ACT

As was stated earlier, to have the "force and effect of law," an administrative rule must not only have certain substantive characteristics, it must also meet specific procedural requirements.[134] Section 553 of the Administrative Procedure Act (APA) prescribes the procedures that must be met in promulgating a rule.[135] In section II, this Article examined the

130. *See* note 9 *supra*. As stated above, "extra-judicial," as used herein, includes administrative proceedings in which OFCCP acts as the prosecuting agency. *See* also 41 C.F.R. § 60-1.25 (1979) which provides an alternative to referral to the Solicitor under 41 C.F.R. § 60-1.26(a)(2) (1979) by permitting the Director to assume jurisdiction.

131. 29 U.S.C. § 160(e) (1976).

132. 29 C.F.R. § 102.53 (1979).

133. *See* note 43 *supra*.

134. *See* text accompanying notes 18-19 *supra*.

135. 5 U.S.C. § 553 (1976) provides:

(a) This section applies, according to the provisions thereof, except to the extent that there is involved—

(1) a military or foreign affairs function of United States; or

(2) a matter relating to agency management or personnel or to public property, loans, grants, benefits, or contracts.

(b) General notice of proposed rule making shall be published in the Federal Register, unless persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law. The notice shall include—

(1) a statement of the time, place and nature of public rule making proceedings;

(2) reference to the legal authority under which the rule is proposed; and

(3) either the terms or substance of the proposed rule or a description of the subjects and issues involved.

Except when notice or hearing is required by statute, this subsection does not apply—

(A) to interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice; or

(B) when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon

substantive characteristics of the back pay regulations.[136] This section will examine the regulations in light of the procedural requirements imposed by the APA.

Section 553 establishes the public notice and comment procedures that must be followed before a valid rule can issue.[137] Under the APA, general notice of proposed rulemaking must be published in the Federal Register at least thirty days before the effective date of the proposed rule.[138] Additionally, interested persons must be afforded an opportunity to submit written data, views, or arguments concerning the rule.[139] The purpose of these procedures was explained in *Guardian Federal Savings & Loan v. Federal Savings & Loan Insurance Corporation*:[140]

> This public participation assures that the agency will have before it the facts and information relevant to a particular administrative problem, as well as suggestions for alternative solutions. Public rulemaking procedures increase the likelihood of administrative responsiveness to the needs and concerns of those affected. And the procedure for public participation tends to promote acquiescence in the result even when objections remain as to substance.[141]

As the court in *Guardian Federal* noted, Congress has excepted a number of administrative actions from these procedural requirements. These exceptions exist to "accommodate situations where the policies

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are impracticable, unnecessary, or contrary to the public interest.

(c) After notice required by this section, the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation. After consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose. When rules are required by statute to be made on the record after opportunity for an agency hearing, sections 556 and 557 of this title apply instead of this subsection.

(d) The required publication or service of a substantive rule shall be made not less than 30 days before its effective date, except—

(1) a substantive rule which grants or recognizes an exemption or relieves a restriction;

(2) interpretative rules and statements of policy; or

(3) as otherwise provided by the agency for good cause found and p7blished with the rule.

(e) Each agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule.

5 U.S.C. § 551(4) (1976) states:

(4) "rule" means the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency and includes the approval or prescription for the future of rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services or allowances therefor or of valuations, costs, or accounting, or practices bearing on any of the foregoing. . . .

136. *See* text accompanying notes 19-133 *supra.*

137. *See* § 553(b) and (c), *supra* note 132. While § 553 ordinarily would not apply to matters relating to contracts, in order to carry out Recommendation No. 16 of the Administrative Conference of the United States, the Secretary of Labor waived that exemption. 29 C.F.R. § 2.7 (1971).

138. *See* § 553(d), *supra* note 132.

139. These procedures constitute the maximum procedural requirements that courts can impose on federal agencies in conducting rule making procedures, although agencies are free to grant additional procedural rights at their own discretion. Vermont Yankee Nuclear Power Corp. v. NRDC, 435 U.S. 519 (1978).

140. 589 F.2d 658 (D.C. Cir. 1978).

141. *Id.* at 662.

promoted by public participation in rulemaking are outweighed by the countervailing considerations of effectiveness, efficiency, expedition and reduction in expense."[142] Section 553(b)(3)(A) currently provides exceptions for (1) interpretative rules, (2) general statements of policy, and (3) rules of agency organization, procedure, or practice.[143]

When OFCCP added the phrase "including back pay where appropriate" to its regulations in 1977, it stated that the change merely "codified OFCCP policies regarding back pay and affected class relief which had been in effect for several years."[144] Indeed, in 1979 OFCCP stated that back pay relief had been available under Executive Order 11246 since at least 1967.[145] Thus, in failing to publish earlier the back pay relief policy or the rules pertaining to its implementation, OFCCP must, to sustain their validity, rely on one of the three exceptions provided by section 553(b)(3)(A).

Since OFCCP has not stated that its back pay policy constitutes a rule, the threshold question is whether the policy is itself a "rule" that would have been subject to the APA procedural requirements at the time of its initial implementation. A subsequent question is whether, regardless of how the practice is characterized, it was made explicit in those regulations that dealt with the provisions to which it would apply.[146]

A. *Whether the Regulations are Within the Purview of the APA Exceptions*

Before the propriety of OFCCP's action with respect to back pay policy and regulations is examined, it is appropriate to provide, as a backdrop to the issue, an overview of the pertinent exceptions from the APA requirements. A universally accepted principle that has guided reviewing courts is that an agency's own characterization of its action is not binding upon the court—thus, if agency action in fact constitutes a rule, compliance with the APA provisions will be required. In *Columbia*

142. *Id.*

143. *See* § 553(b)(3)(A), *supra* note 135.

144. 42 Fed. Reg. 3456 (1977).

145. 44 Fed. Reg. 77,000 (1979).

146. The thrust of this inquiry is not predicated on the idea that established rules or policies were to be re-submitted through rule making procedures once the waiver became effective, since the court in Crown Zellerback Corp. v. Marshall, 441 F. Supp. 1110, 1119 (E.D. La. 1977), has expressly held that such is not required inasmuch as there was no indication that the waiver was to be applied retroactively. It is assumed, however, that to the extent that the policy would be implemented through regulations proposed subsequent to the effective date of the waiver, its existence should have been included therein. Indeed, publication of the policy may well have been required under the Freedom of Information Act (FOIA).

The policy on back pay, later included in Revised Order No. 4, 41 C.F.R. § 60-2.1 (1979), was not set forth when Part 60-2 of the Regulations (Revised Order No. 4) was added on December 4, 1971, even though OFCCP contends that it has been in existence since 1967. Except for a 1974 amendment, which made back pay relief express, and which provided that affected class relief was to be included in a conciliation agreement rather than in the contractor's affirmative action program or a separate written corrective action program, this section has been unchanged since 1971. Thus, on at least these two occasions, even if the "policy" had not been properly the subject of a "rule", OFCCP could have apprised the public of its existence, but failed to do so.

Broadcasting System, Inc. v. United States,[147] the Court stated: "The particular label placed upon it by the [Federal Communications] Commission is not necessarily conclusive, for it is the substance of what the Commission has purported to do and has done which is decisive."[148]

1. *The Interpretative Rule Exception*

One of the exceptions to the APA public notice and comment procedures is the "interpretative rule."[149] According to *Gibson Wine Co. v. Snyder*:[150]

> The distinctive characteristics of interpretative rulings, as contrasted with so-called regulations, have long been recognized. Administrative officials frequently announce their views as to the meaning of statutes or regulations. Generally speaking, it seems to be established that "regulations", "substantive rules" or "legislative rules" are those which create law, usually implementary to an existing law; whereas interpretative rules are statements as to what the administrative officer thinks the statute or regulation means.[151]

An examination of those decisions that distinguish between substantive rules and interpretative rules reveals that the determinative factors are (1) whether the rule is intended to have the full force and effect of law, and (2) whether a significant change, not authorized under existing regulations, is made with respect to the obligations of affected persons.[152] These factors were held to be critical in *Reyes v. Klein*,[153] in which an action was brought against certain state officials for declaratory and injunctive relief based on their alleged failure to enforce and comply with requirements promulgated pursuant to the Federal Food Stamp Program—specifically, the requirement that the variable purchase option be included on the face of the "authorization to purchase" card. In

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147. 316 U.S. 407 (1941). Although this case arose prior to the enactment of the APA and the issues before the Court were whether the regulations constituted a reviewable order under § 402(a) of the Federal Communications Act of 1934 and, if so, whether an equitable cause of action had been stated, it is unquestioned that the analysis is helpful in making distinctions between a rule and a general statement of policy under the APA. Pacific Gas and Electric Co. v. FPC, 506 F.2d 33, 42 n.25 (D.C. Cir. 1974).

148. 316 U.S. at 416.

149. While, for analytical purposes, the authors discuss the exceptions as if they are discrete and not overlapping, the difficulty in making such distinctions is well recognized. *See* K. DAVIS, ADMINISTRATIVE LAW TREATISE § 7.5, at 25 (1979) [hereinafter cited as DAVIS].

150. 194 F.2d 329 (D.C. Cir. 1952).

151. *Id.* at 331.

152. In General Electric Co. v. Gilbert, 429 U.S. 125 (1976), the effect of EEOC interpretative rules concerning sickness and accident benefits for disability due to pregnancy was examined. The Court held that EEOC's "rulings, interpretations, and opinions", while not controlling upon the courts by reason of their authority, constituted "a body of experience and informed judgment to which courts and litigants may properly resort for guidance." *Id.* at 141-42. The weight to be accorded them, according to the Court, would "depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control." *Id.* The EEOC guideline was found lacking in persuasive value because it was not a contemporaneous interpretation, it contradicted the agency's earlier position and was not supported by legislative history.

153. 411 F. Supp. 1241 (D.N.J. 1976).

response to plaintiffs' motion for partial summary judgment, the defendants asserted that because the regulations had not been validly promulgated, they could not have the effect of law. Observing that the instruction could have been excepted from the APA requirements as an "interpretative rule," the court ultimately rejected that characterization and held the instruction to be invalid and unenforceable because (1) it set forth a requirement not contained in prior regulations, (2) it was mandatory, and (3) it was intended to have the force of law.[154]

Continental Oil Co. v. Burns[155] sets forth a good discussion of the distinction between interpretative and substantive rules. In that case, an action was brought against the Board of Governors of the Federal Reserve System and the Federal Trade Commission (FTC) for declaratory and injunctive relief in connection with an interpretation of the Truth in Lending Act which had been issued by the Board of Governors. The interpretation, which had been published in the Federal Register on May 10, 1969, without compliance with the APA procedures, set forth three criteria for determining when a "late payment" charge must be considered a "finance" charge. Continental Oil contended that because of the unexpected adoption of the rule, it was threatened with both an FTC enforcement action and the possibility of extensive civil liability as a result of numerous class actions that had been filed by its customers. The government contended that the interpretation was an "interpretative rule" and that compliance with the APA requirements thus was not necessary. The court stated:

> An administrative interpretation or interpretative rule is a clarification or explanation of existing laws or regulations rather than a substantive modification in or adoption of new regulations. Substantive legislative rules and regulations "create law—whereas interpretative rules are statements as to what the administrative officer thinks the statute or regulation means."[156]

The court concluded that the FTC interpretation at issue was, in fact, an interpretative rule and as such was not subject to the APA notice and comment provisions. In reaching this conclusion, the court considered three determinative factors. First, the court noted that the interpretation was not a complex and pervasive regulatory scheme, but instead merely represented an attempt to clarify or define the meaning of "actual unanticipated late payment" charge.[157] Second, the court concluded that the interpretation effected no drastic change in the existing law, since the explanation of the section preceded the effective date of the Truth in Lending Act and the regulation. Accordingly, there was no retroactive effect to the interpretation.[158] Finally, the court held that the three criteria

154. *Id.* at 1246.
155. 317 F. Supp. 194 (D. Del. 1970).
156. *Id.* at 197. (Citations omitted).
157. *Id.* at 198.
158. *Id.*

set forth in the interpretation were not confusing or controversial and that compliance would be no more onerous to this plaintiff than to others subject to its requirements.[159]

Further insight into the "interpretative rule" exemption may be gleaned from examination of cases in which the exemption was rejected. In *Guardian Federal Savings & Loan Association v. Federal Savings & Loan Insurance Corporation*,[160] the court held that a regulation that required audits to be conducted exclusively by non-agency accountants was not an interpretative rule because it purported to change the course of agency policy.[161]

In *Pickus v. United States Board of Parole*,[162] it was held that the parole selection criteria promulgated by the parole board did not constitute interpretative rules inasmuch as they were self-imposed controls over the manner and circumstances in which the agency would exercise its statutorily broad power and substantially affected persons' rights.[163] In *Aiken v. Obledo*,[164] which concerned a regulation that placed restrictions on the certification of households for food stamp benefits pending verification, and in *Spring Mills, Inc. v. Consumer Products Safety Commission*,[165] which concerned regulations that banned a certain flame retardant, the courts held that the agency rules did not constitute interpretative rules because they had the effect of law with far-reaching consequences.[166]

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159. *Id.* Continental Oil argued that because a proposed amendment to Regulation Z embodying the content of Interpretation § 226.401 issued by the Board for comment on April 13, 1970, had never been adopted, the interpretation actually constituted a substantive rule and not merely an interpretation. The court observed that since the proposed amendment set forth only one criterion for including late payment charges and the calculation of finance charges; it would have the effect of narrowing the existing exception, and thus, the fact that the Board followed the notice and comment procedures was not relevant. *Id.* at 198-9. Continental also attempted to rely on a letter from the Acting Chief of the Division of Consumer Credit, written in response to the proposed amendment, as support for the argument that the Commission believed that the interpretation went beyond the existing Regulation Z. The court, however, found that a careful reading of the letter did not support this argument. *Id.* at 199-200.

160. 589 F.2d 658 (D.C. Cir. 1978).

161. *Id.* at 665. The court, however, concluded that it was exempt from the APA procedures as a "rule of agency . . . procedure." *Id.*

162. 507 F.2d 1107 (D.C. Cir. 1974).

163. *Id.* at 1113. Professor Davis criticizes this decision, observing that the "court failed to make the crucial inquiry—whether the Board in issuing the regulation was exercising delegated power to make rules having force of law." DAVIS, *supra* note 149, § 7.15, at 72. He concluded that the rule could not be a legislative rule because the board had no power to make law and that the court thereby conferred power on the board that Congress had not given. *Id.* at 73. He further concluded that the guiding principle should have been: "Any officer who has discretion power necessarily also has the power to state publicly the manner in which he exercises it, and any such public statement can be adopted with or without § 553 procedure." *Id.* Even if it were characterized as an interpretative rule not subject to APA procedure, he stated that such procedure could have been required by the court on the theory that fairness required notice and comment procedure. *Id.* at 74.

164. 442 F. Supp. 628 (E.D. Cal. 1977).

165. 434 F. Supp. 416 (D.S.C. 1977).

166. *See* text accompanying notes 178-180 *infra* (discussion of "substantial impact" test).

2. *The "General Statements of Policy" Exception*

Another exception to the APA rulemaking procedures exists for general statements of agency policy, the parameters of which were explained by the court in *Guardian Federal Savings & Loan Association v. Federal Savings & Loan Insurance Corp.*,[167] by the following language:

> The term "general statements of policy" has been explicated in the Attorney General's Manual as embracing "statements issued by an agency to advise the public prospectively of the manner in which the agency proposes to exercise the discretionary power." As this court has had occasion to note, a critical test of whether a rule is a general statement of policy is its practical effect in a subsequent administrative proceeding: "A general statement of policy . . . does not establish a binding norm." It is not finally determinative of the issues or rights to which it is addressed.[168]

At issue in *Guardian Federal* was a regulation that specified the criteria to be met in producing satisfactory audit reports for the Federal Savings and Loan Insurance Corporation. The court found the regulation to be a statement of policy because it preserved the administrator's discretion by allowing the Chief Examiner to determine "whether an auditor is satisfactory, whether an audit was conducted in a satisfactory manner and whether a report of audit is to be accepted."[169]

In addition to the questions whether agency action constitutes a "particularized mandate"[170] for the exercise of discretion, or has a "final, inflexible impact,"[171] several courts also have focused on whether the action effects some substantial change. In *Texaco, Inc. v. Federal Power Commission*,[172] for instance, the court held that an order requiring for the first time that compound interest be paid on amounts ordered refunded pursuant to the Natural Gas Act was not a "general statement of policy" because it adopted "a substantive rule imposing such rights and obligations which an operator has the burden of proving should not apply

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167. 589 F.2d 658 (D.C. Cir. 1978).

168. *Id.* at 666. The court noted that:

> If it appears that a so-called policy statement is in purpose or likely effect one that narrowly limits administrative discretion, it will be taken for what it is—a binding rule of substantive law. . . . The mere existence of some discretion is not sufficient, although it is necessary, for a rule to be classified as a general statement of policy. . . . A matter of judgment is involved in distinguishing between rules, however discretionary in form, that effectively circumscribe administrative choice, and rules that contemplate that the administrator will exercise an informed discretion in the various cases that arise.

Id. at 666-67.

169. *Id.* at 666. The court emphasized the fact that the criteria were set forth in relation to a regulation promulgated with conceded procedural regularity authorizing FSLIC to "at any time make, or cause to be made, an audit of an insured institution" to be conducted "by auditors and in a manner satisfactory to [FSLIC] in accordance with general policies from time to time established by the board." 12 C.F.R. § 563.17-1(a)2. *See* DAVIS, *supra* note 149, § 7.6, at 32, for discussion of this case.

170. *See* note 174 *infra*.

171. Pacific Gas and Electric Co. v. FPC, 506 F.2d 33 (D.C. Cir. 1974).

172. 412 F.2d 740 (3rd Cir. 1969).

in any waiver or similar proceeding."[173] Additionally, the court noted that this provision was not set forth in the section that contained the other statements of general policy and interpretation.[174]

3. *The "Rules of Agency Organization, Procedure, or Practice" Exception*

The final exception to the APA procedural requirements exists for rules of agency organization, procedure, or practice. According to the court in *Pickus v. United States Board of Parole*,[175] this exception is intended to include "technical regulation of the form of agency action and proceedings"[176] and should not include any action that goes beyond formality or that substantially affects the rights of those over whom the agency exercises authority.[177]

To avoid the complicated problems in distinguishing between substantive rules on the one hand and interpretative rules, general statements of policy, and rules of agency procedure on the other, a number of courts have taken a more practical approach to whether agency action is exempt from the notice and comment procedures of the APA. These courts now decide the issue whether compliance with the APA procedures is required by determining whether the action has a significant or substantial impact on those regulated.[178] In *Lewis-Mota v. Secretary of*

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173. *Id.* at 744.

174. *Id.* In Aiken v. Obledo, 442 F. Supp. 628 (E.D. Cal. 1977), the court held that the rules which imposed an obligation on emergency food stamp applicants and had a substantial impact on those seeking emergency food stamp certification constituted a "particularized mandate" that had to be obeyed by the state agencies administering the Food Stamp Program rather than a general policy statement. *See also* Eastern Ky. Welfare Rights Org. v. Simon, 506 F.2d 1278, 1290 (D.C. Cir. 1974), discussed in note 180 *infra.*

175. 507 F.2d 1107 (D.C. Cir. 1974).

176. *Id.* at 1113.

177. *Id.* The determination of whether a rule is procedural or substantive is by no means a simple one. According to DAVIS, *supra* note 149, § 6.29, at 589, this exemption "raises all the difficult problems of what is substance and what is procedure." Indeed, he questions whether the impact of the rule should be considered in the determination, stating that:

> The most authoritative decision on this question gives an affirmative answer. *National Motor Freight Traffic Assn. v. United States*, 268 F. Supp. 90 (D.C.C. 1967), *aff'd* 393 U.S. 18 (1968). The ICC issued a "Notice" that it had approved a method by which motor carriers and freight forwarders could informally pay reparations to shippers; no such procedure was previously available, and the impact on substance was very strong. The district court in an opinion by Judge McGowan held that the Commission took a significant step in the implementation of the newly-conferred statutory judicial remedy for reparations when it instituted the procedure here in question, and that the requirements of § 553 were applicable. To the argument that the rule was exempt as a procedural rule, the court responded: "The characterizations 'substantive' and 'procedural' no more here than elsewhere in the law—do not guide inexorably to the right result, nor do they really advance the inquiry very far." 268 F. Supp. at 96. The Supreme Court's affirmance makes the decision Supreme Court law.

Id. He examines the irreconcilable conclusions reached by some courts on this exemption and characterizes Pharmaceutical Mfrs. Ass'n v. Finch, 307 F. Supp. 858 (D. Del. 1970), as "somewhat more sophisticated" because of the court's focus on the "impact" of the rule. DAVIS, *supra* note 147, § 6.29, at 590.

178. *See, e.g.*, Pharmaceutical Manufacturer's Ass'n v. Finch, 307 F. Supp. 858 (D. Del. 1970). Professor Davis praised this decision as a "good illustration of the proper use of the substantial impact

Labor,[179] one example of the use of this theory, the Secretary of Labor had issued a directive that revoked the schedules of occupations found to be in short labor supply and thereafter required precertified aliens to submit proof of specific job offers and a statement of their qualifications. Focusing on the substantive effect of the directive, the court found that this constituted a "rule" subject to APA procedures because it "changed existing rights and obligations" and had a "substantial impact" upon both the aliens and the employers by making it more difficult for employers to fill vacancies in those occupations no longer precertified.[180]

B. *Whether the Regulations Must Be Published After Adoption*

Regardless of whether an agency's action constitutes a rule subject to the APA publish and comment procedures, the Freedom of Information

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test" and stated that it has a "leading-case status." DAVIS, *supra* note 147, § 7.17, at 79. He stated that its "essential holding"—"one that may be thoroughly sound—is that whether the rules were interpretative or legislative, their impact was substantial enough that a court should require notice and comment procedure for issuing them." *Id.* at 80.

According to *Davis*, the courts often confuse two ideas in the substantial impact theory: "1) Substantial impact gives rules force of law. 2) Substantial impact of rules means that an agency should be required to use notice and comment procedures in issuing them." He cites Lewis-Mota v. Secretary of Labor, 469 F.2d 478 (2d Cir. 1972), as "a good example of confusion of the two ideas." DAVIS, *supra* note 147, § 7.16, at 76.

179. 469 F.2d 478 (2d Cir. 1972).

180. *Id.* at 482. The court relied on the case of Columbia Broadcasting Sys. Inc. v. United States, 316 U.S. 407, 416 (1942), for this principle.

The *Lewis-Mota* decision is discussed by Professor Davis at DAVIS, *supra* note 149, § 7.15, at 74-76. Professor Davis further states that the reason for the substantial impact rule is the reaction of some courts to the large scale exemptions from the APA's procedural requirements, observing that many rules having substantial impact are exempt from the procedural requirements of § 663 in spite of their vital effect on private interests. *Id.* at 77.

Despite the drawbacks associated with the exemptions for interpretative rules and general statements of policy, many commentators believe that they should be retained because they serve the public interests by encouraging agencies to be more open. *See, e.g.*, Asimow, *Public Participation in the Adoption of Interpretative Rules and Policy Statements*, 75 MICH. L. REV. 521, 575-84 (1977); Bonfield, *Some Tentative Thoughts on Public Participation in the Making of Interpretative Rules and General Statements of Policy Under the A.P.A.*, 23 AD. L. REV. 101, 117-28 (1971). The courts in Guardian Fed. Sav. & Loan Ass'n v. Fed. Sav. & Loan Ins. Corp., 589 F.2d 658 (D.C. Cir. 1978), and Energy Reserves Group, Inc. v. Federal Energy Admin., 447 F. Supp. 1135 (D. Kan. 1978), took an approach similar to *Lewis-Mota*. In *Energy Reserves*, the court noted that the congressional conference committee expressly required consideration of the impact on the regulated industry and held that the test for determining whether a rule of order is substantive or interpretative is the language of the order itself and the language of subsequent proceedings concerning the subject matter of the order. On the latter issue, the court stated:

> Where the order is phrased as a guide to the agency's present views, subject to change, and with no suggestion these views have the finality or force of substantive regulations; or where the order has no immediate inflexible impact and is specifically left open to discussion, such agency orders are deemed to be interpretative.

447 F. Supp. at 1144 (citations omitted). This court, therefore, did not make the common mistake of confusing the two problems pointed out by Professor Davis: the problem of whether a rule is interpretative or legislative and the problem of what rulemaking procedure is required since the issues were treated separately as he suggested. DAVIS, *supra* note 149, § 7.15, at 76. See Eastern Ky. Welfare Rights Org. v. Simon, 506 F.2d 1278, 1290 (D.C. Cir. 1974) (en banc) in which a ruling was held to be interpretative despite its substantial impact of denying medical care to millions of poor people without procedural protection. The majority of the court held that the ruling had no substantial impact. Professor Davis praised the decision because the court squarely held that impact alone cannot give rules the force of law and recognized that the common law might require notice and comment procedure. DAVIS, supra note 149, § 7.17, at 82-83.

Act (FOIA)[181] requires publication in the Federal Register of certain types of rules after they have become effective.[182]

In light of the earlier discussion, we will briefly examine section 552(a)(1)(D) of the FOIA, which requires publication of "substantive rules of general applicability," "statements of general policy" and "interpretations of general applicability formulated and adopted by the agency."[183] In addition, subsection 552(a)(1)(C) requires publication of agency rules of procedure.[184] The key question concerns the meaning of "general applicability," since procedures that are not of general applicability only need be made available for copying. Professor Davis has observed that the idea of "impact" has been engrafted upon this description by the court in *Lewis v. Weinberger*,[185] and constitutes a constructive approach that likely is consistent with congressional intent.[186]

Examination of two cases may be informative with respect to section 552(a)(1).[187] In *Aiken v. Obledo*,[188] FOIA claims were asserted along with assertions of invalidity for failure to comply with the APA publish and comment procedures. Although the analysis of the *Aiken* court was somewhat labored, its essential conclusion was that if a rule can be characterized as an interpretative rule of "general applicability," it must be published.[189] On the issue of "general applicability," the court relied on *Anderson v. Butz*,[190] and stated that: "An interpretative rule of general applicability is one which constitutes a change from existing practice and has a significant impact upon a segment of those regulated."[191] The *Aiken* court also held that the rule at issue did not constitute a statement of agency policy because it was not a "touchstone," but rather constituted a

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181. 5 U.S.C. § 552 (1976).

182. *Id.* § 552(a) & (b) (1976). Section 552 was enacted in 1966 as a replacement for § 3 of the Administrative Procedure Act as enacted in 1946. It became effective in 1967 and was amended in 1974 to include measures designed to compel agency compliance.

183. *Id.*

184. *Id.*

185. 415 F. Supp. 652 (D.N.M. 1976).

186. DAVIS, *supra* note 149, § 5.11, at 343-44. Davis also refers to Anderson v. Butz, 550 F.2d 459 (9th Cir. 1977), discussed in text accompanying notes 194-96 *infra*.

187. The FOIA is examined in Campbell, *Reverse Freedom of Information Act Litigation: The Need for Congressional Action*, 67 GEO. L. J. 103, 104-10 (1978).

188. 442 F. Supp. 628 (E.D. 3 1977).

189. 442 F. Supp. at 653. The difficulty in following the analysis is not the fault of the court, but rather inheres in the statutes. According to DAVIS, *supra* note 149, § 7.6, at 32:

> Four terms in §§ 552 and 553 can probably be differentiated, but doing so with precision seems unpromising. Are "statements of general policy" the same as or different from "general statements of policy"? The first term appears in § 552(a)(1)(D), and the second in § 553(b)(3)(A). The word "general" in those two phrases distinguishes them from two other phrases—"those statements of policy and interpretations which have been adopted by the agency and are not published in the Federal Register" in § 552(a)(2)(B), and "interpretative rules and statements of policy" in § 553(d)(2). Of course, the meanings of such statutory terms have to come largely from the contexts of the problems of interpretation.

190. 550 F.2d 459 (9th Cir. 1977).

191. 442 F. Supp. at 653.

"particularized mandate," which compelled obedience by the state agencies.[192]

After determining that the rule was not a statement of policy or an interpretative rule, the court concluded that it was either a procedural rule or a substantive rule, and that, in either event, publication was required. Since the rule had not been published, the court held that the agency had violated FOIA by implementing a rule which had not been published in final form and, therefore, declared the rule to be invalid.[193]

In *Anderson v. Butz*,[194] a regulation of the Secretary of Agriculture that required that certain housing subsidies paid by the Department of Housing and Urban Development be treated as income for food stamp purposes was alleged to be invalid on both procedural and substantive grounds under the APA publish and comment procedure and FOIA. The court squarely rejected the government's contention that the instruction fell within the purview of the provisions requiring availability only for public inspection and copying. The court stated that there was a significant difference between the rules and statements of policy that affects only the internal operations or actions of an agency and those that affect the substantive rights of others outside the agency.[195] The court thus held that because the instruction had a significant effect on food stamp recipients and its effect would be widespread and immediate, compliance with the APA procedures was required.[196]

C. *Examination of OFCCP's Action with Respect to Back Pay Relief*

The foregoing detailed examination of exemptions has been presented for two purposes: first, it will serve as background for a discussion of OFCCP's back pay policy and regulations; and second, it demonstrates the "fuzziness" that pervades the area. Thus, it is hoped that the reader can properly assess the authors' conclusions. The following discussion assumes that the Executive Order conferred upon OFCCP the authority to create the back pay relief policy and regulations embodying it and focuses on whether the policy and regulations were properly promulgated.[197]

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192. *Id.* In so doing the court relied on Ashgrove Cement Co. v. FTC, 519 F.2d 934, 935 (D.C. Cir. 1975), in which the court held that a "policy determination" denotes a final agency decision which is utilized as a "touchstone for future administrative action."

193. *Id.* at 654. This same approach, *i.e.*, reliance on lack of publication for finding a rule to be interpretative, was utilized in Thomas v. County Office Comm. of Cameron County, 327 F. Supp. 1244, 1253 (S.D. Tex. 1971).

194. 428 F. Supp. 245 (E.D. Cal. 1975).

195. *Id.* at 249.

196. *Id.* at 250. In *Anderson*, the Court of Appeals held that even though recipients received actual notice of the instruction at the time they sought the injunction, it did not constitute the "timely notice" contemplated by Congress. 550 F.2d at 463. The court, however, did not explain how it knew what Congress intended by "actual notice" when required prior to a person's being adversely affected by an unpublished rule.

197. It is further assumed that, because of the substantial likelihood such a theory would be

First, we shall discuss whether OFCCP's policy of requiring back pay from government contractors for affected class members, which, according to it, has been in existence since at least 1967,[198] constituted a "rule" that would have been subject to the APA publish and comment procedures in the absence of the contract exemption. The operational premise is that the policy would have constituted a rule unless it was exempt as an interpretative rule or a general statement of policy.[199]

1. *Exemption as an Interpretative Rule*

A question exists whether, prior to the inclusion by OFCCP of the phrase "back pay" in the regulations in 1977, OFCCP's interpretation of the word "relief" to include back pay was entitled to be given the force of law. It is possible that OFCCP's back pay policy would have satisfied the first determinative factor necessary for exemption as an interpretative rule—that since it was not set forth in the regulations, it was not intended to have the full force and effect of law.

It is more probable, however, that OFCCP had the opposite intent. First, OFCCP was delegated the authority to make substantive rules. Moreover, even though the back pay policy allegedly was created before the regulations mandating "relief" were promulgated, it must be assumed for analytical purposes that OFCCP intended to embody that policy in Revised Order No. 4, added in 1971.[200] The Revised Order, which expressly referred to "relief," obviously was intended to have the full force and effect of law.[201] Based on this assumption, it is probable that, at least since 1971, the policy was intended to have the force and effect of law. Finally, the effect of the policy compels this conclusion. The policy would be enforced by finding a contractor who fails to include back pay in a conciliation agreement upon demand to be in noncompliance. Thus, government contractors would be subject to the same sanctions and penalties as would apply had they violated other substantive provisions of Executive Order 11246 or the regulations.[202]

The conclusion that the policy would not be exempt as an interpretative rule is not undercut by *Continental Oil v. Burns*.[203] Unlike

rejected, exemption as a rule of agency procedure would not be used as a justification for failure to comply with the publish and comment procedures. For discussion of this exemption, *see* text accompanying notes 175-80 *supra*.

198. This statement was probably made in order to gain judicial deference to the policy as a contemporaneous interpretation of the Executive Order. *See* discussion in note 150 *supra*.

199. For analytical purposes the contracts exemption is not discussed for the reasons set forth in footnote 146.

200. Otherwise, we find ourselves with a policy that OFCCP did not attempt to promulgate for nine years after its formulation in 1967.

201. *See* letter from Phillip J. Davis, Acting Director of OFCCP to Mr. Marion A. Bowden, Assistant to the General Manager for Equal Employment Opportunity, April 6, 1973, attached as Exhibit C to Response of Kerr Glass Manufacturing Corporation to Defendants' Motion to Dismiss in Kerr Glass Manufacturing Corporation v. Dunlop, No. 75-0597 (D.C. 1975).

202. *See* text accompanying note 23 *supra* for a discussion of this issue.

203. *See* text accompanying note 155 *supra*.

the situation in that case, the announcement of the back pay policy did not precede the effective date of the regulation. Indeed, government contractors had no way of knowing that the policy existed until March 26, 1975, when OFCCP published for comment proposed guidelines expressing its interpretation.[204] The back pay policy had not been set forth in Revised Order No. 4, which had been promulgated in 1971.[205]

Thus, from October 24, 1965, when OFCCP adopted as temporary regulations the "rules, regulations, orders, instructions, and other directives, issued by the President's Committee on Equal Employment Opportunity"[206] until the proposed guidelines were issued for comment, government contractors had no notice of the back pay policy.[207] The fact that eight years elapsed before OFCCP published the policy for comment clearly distinguishes these facts from those in *Continental Oil.*

Consequently, the policy interpreting "relief" to mandate the inclusion of a "make whole" remedy, if found appropriate by OFCCP, effected a drastic change in the existing law. Moreover, because "relief" could be sought for a period of time that preceded the date on which notice of this obligation was given, the new interpretation would be given a retroactive effect, the absence of which the *Continental Oil* court found determinative.[208] Furthermore, unlike *American Bancorporation, Inc. v. Board of Governors,*[209] the effect of the interpretation was, in fact, to broaden the term "relief" rather than to narrow it. Nor would the changed meaning of the term have fallen within the purview of *National Restaurant Association v. Simon*[210] as merely imposing a new reporting requirement, since it potentially exposed government contractors to the payment of relief amounting to millions of dollars.[211] Such a drastic change could not be effected by an interpretative rule.

Thus, because of the drastic change that it effected in the law, coupled with its substantial impact upon government contractors, OFCCP's interpretation of relief would probably not have been exempt from the APA procedures as an interpretative rule at the time of its formulation in 1967. Consequently, OFCCP's action in failing to publish it for comment

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204. 40 Fed. Reg. 13,311 (1975). The strong opposition to the guidelines is confirmation of this fact.

205. These regulations were promulgated after the effective date of the waiver of the contracts exemption on July 10, 1971, 41 C.F.R. § 2.7 (1971). Thus, it may be argued that the policy must have been included in the initial Revised Order to be enforceable since, as the authors have concluded, it was not exempt from the publish and comment procedures.

206. 30 Fed. Reg. 13,441 (1965).

207. The fact that the guidelines were never formally adopted may have lulled contractors into a belief that OFCCP did not intend to continue the policy since its authority to do so had been questioned and the guidelines had met with strong opposition.

208. *See* text accompanying note 158 *supra.*

209. 509 F.2d 29 (8th Cir. 1974).

210. 411 F. Supp. 993 (D.D.C. 1976).

211. *See* text accompanying note 21 *supra* (indication of magnitude of potential exposure).

would fall squarely within the ambit of *Reyes v. Klein*,[212] and the interpretation would be invalid and unenforceable.

Moreover, despite the contracts exemption, and even if the back pay policy had been within the interpretative rule exception, notions of fundamental fairness may well have led to a judicial requirement that the policy be expressly stated when it was implemented. As indicated earlier, Revised Order No. 4 was adopted shortly after the contracts waiver, and was amended in 1975. Given the impact of that Order, OFCCP may well have been required, at least at the time of its initial promulgation in 1971, to set forth its interpretation as part of the rule. Even if it is accepted that the interpretation itself, which was allegedly created prior to the contracts waiver, would not have had to be repromulgated after the waiver even if it constituted a substantive rule, because that interpretation constituted an integral part of the Revised Order that was promulgated after the contracts waiver, and because it would have a substantial impact, it should have been included as part of the order were it to be enforced by OFCCP.[213]

2. *Exemption as a General Statement of Policy*

Assuming that the policy originally implemented in 1967 was identical to that promulgated in Revised Order No. 4 in 1971,[214] except that in the Revised Order OFCCP included its own interpretation of the word "relief," the back pay policy probably would not have been exempt from the APA's publish and comment procedures as a "general statement of policy" because there was no indication that the definition of the term "relief" in the Revised Order was subject to OFCCP's discretion.[215] Nor does the incorporation of the section 60-2.2 requirements for an "acceptable affirmative action program" add any element of discretion[216]

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212. *See* text accompanying notes 153-54 *supra*.

213. In Legal Aid Soc'y v. Brennan, 608 F.2d 1319 (9th Cir. 1979), the court did not decide whether Technical Guidance Memo No. 1 was "a legislative rule having a substantial impact upon the rights and obligations of federal contractors, and was invalid because not issued pursuant to the rulemaking procedures of 5 U.S.C. § 553." The district court had held that reference to it had not been necessary in reaching a decision. The Memo, which gave guidance on the "proper interpretation" of certain selected issues regarding Revised Order 4, was claimed to be exempt as an interpretative rule. It should be noted that this case has implications for OFCCP's manual, discussed in text accompanying notes 94-116 *supra*.

214. There was no comparable section in Order No. 4, 41 C.F.R. § 60-2.1 (1971), published in 35 Fed. Reg. 2586 (1970).

215. The pertinent language was:

> Relief for members of an "affected class" who, by virtue of past discrimination, continue to suffer the present effects of that discrimination must either be included in the contractor's affirmative action program or be embodied in a separate written "corrective action" program. An "affected class" problem must be remedied in order for a contractor to be considered in compliance. Section 60-2.2 herein pertaining to an acceptable affirmative action program is also applicable to the failure to remedy discrimination against members of an "affected class."

41 C.F.R. § 60-2.1 (1972). According to the Court in Illinois Tool Works, Inc. v. Marshall: "Section 60-2.1(b) merely provides that a contractor has not complied with the Order as long as he has an 'affected class' problem. But a hearing on the merits is necessary to determine whether he actually has an affected class problem." 601 F.2d 943, 948 (7th Cir. 1979).

216. In *Legal Aid Society*, it is interesting to note that the court implied that "questions as to . . . what should be done to secure compliance once it is determined that a contractor has violated

since the parameters of "acceptability" are tied to sections 60-2.10 through 60-2.32, which contain no reference to relief.

In *Guardian Federal Savings & Loan Association v. Federal Savings & Loan Insurance Corp.*,[217] the court held that the rule involved there was exempt as a policy statement because it had been promulgated in connection with a regulation that preserved the administrator's discretion with respect to the new rule. The absence of this factor probably would be determinative in the instant situation. As promulgated, Revised Order No. 4 failed to preserve OFCCP's discretion to require relief in the nature of corrective action.[218]

Moreover, as in *Texaco, Inc.*[219] and *Aiken*,[220] attention in the instant situation probably would have focused upon whether the inclusion of the phrase effected a substantial change in existing law or had a substantial impact on government contractors. The inclusion effected both results. Indeed, the impact of OFCCP's action paralleled that of a rule rejected as a policy statement in *Texaco, Inc.*, in which the challenged agency action potentially entailed large sums of money.[221] Thus, the OFCCP policy probably would not have been exempt from the publish and comment procedures as a statement of policy. For these same reasons, the policy would probably not have been exempt under the "substantial impact" test.[222]

It is, of course, arguable that the back pay policy would have been exempt from the publish and comment procedures as a policy statement. The argument would be predicated on the assumption that the back pay policy as originally implemented was not the same as that set forth in a Revised Order No. 4, but rather was expressly included in the phrase "where appropriate," which was subsequently added in 1977. That phrase would arguably have maintained the administrator's discretion, as required by the courts in *Guardian Federal*[223] and *Noel v. Chapman*,[224] and would

his affirmative action obligations (to which the conciliation provisions are directed)" are a matter of discretion for which a mandamus action is appropriate. 608 F.2d at 1331. The authors have no quarrel with this conclusion inasmuch as it does not state that the discretion is unbridled. Our contention is simply that the parameters of the term "relief" are set forth in other provisions of the regulations which are, *inter alia*, limited to corrective action. These parameters were implicitly recognized by the *Legal Aid Society* court. *Id.*

217. 589 F.2d 658 (D.C. Cir. 1978).

218. *See* Note, *Recovery of Back Pay Under Executive Order 11,246*, 52 S. CAL. L. REV. 767, 772-76 (1979) in which the author states that even in the Standard Compliance Review Report: "The emphasis, to the extent discernible in the Report, appeared to be on promotion or transfer; back pay was not mentioned." *Id.* at 776.

219. *See* text accompanying notes 172-74 *supra.*

220. *See* note 174 *supra.*

221. The Federal Power Commission's new rule requiring compound interest on the amounts ordered refunded pursuant to the Natural Gas Act was held not to be a general policy statement because it adopted a substantative rule imposing rights and obligations that had to be disproved by the operator in a waiver or similar proceeding. Similarly, the inappropriateness of back pay would have to be established by government contractors with OFCCP's action.

222. *See* text accompanying notes 181-85 *supra* (discussion of "substantial impact" test).

223. *See* text accompanying notes 163-66 *supra.*

224. *See* text accompanying notes 170-72 *supra.*

have prevented characterization of the policy as a "particularized mandate." These words also may well have answered any argument that the inclusion of the policy had a "final, inflexible impact" upon government contractors. Inasmuch as the Revised Order was added after the policy was created, however, it seems more logical to conclude that the existing policy was embodied therein and that OFCCP's further amendments reflect refinement and development of the policy. For this reason, the authors have assumed that the policy implemented in 1967 was the same as that set forth in the 1971 regulations.

Thus, the authors have concluded that the back pay policy probably would have been subject to the APA procedures but for the contracts exemption. Still, the fact that repromulgation of existing rules was not required after waiver of that exemption arguably does not relieve OFCCP of liability for improper promulgation of the policy because (1) the Revised Order, through which the back pay policy would be implemented, was not adopted until after the waiver and (2) the Revised Order was the subject of an amendment in 1974. Moreover, OFCCP's reliance upon either the interpretative rule or policy statement exemption may have subjected it to the court's scorn.[225]

Finally, regardless of whether compliance with the publish and comment procedures was required, FOIA probably mandated publication. As indicated earlier, the test of general applicability of the FOIA publication rules turns on the impact of the rule. On this basis, publication of the policy probably was required as either a statement of general policy, a substantive rule of general applicability, or an interpretation of general applicability.

3. *The Validity of Inclusion of the Phrase in the 1977 Regulations*

In 1976, the OFCCP published proposed regulations in furtherance of its duties pursuant to Executive Order 11246. These proposed regulations did not include the phrase "including back pay where appropriate" in its outline of possible remedial provisions in conciliation agreements. The regulations as adopted in 1977 did include this phrase.[226] Having concluded that the back pay policy is not exempt from the APA procedures, the question that arises is whether this omission rendered invalid its inclusion in the final regulations.

Clearly, the effect of the addition of the back pay phrase is determinative of the issue. Indeed, based on the prior conclusions on the

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225. In Spring Mills, Inc. v. Consumer Product Safety Comm'n, 434 F. Supp. 416 (D.S.C. 1977), the court rejected the Commission's action in declaring an article a "banned hazardous substance" without compliance with the proper steps, stating: "That any agency of the United States Government should try to hide such far reaching and drastic measures under the label of an 'interpretation' is scandalous. . . . Their action is the most flagrant misbranding imaginable." *Id.* at 430.

226. *See* discussion in note 11 *supra.*

applicability of the APA procedures and in the absence of other factors, no further discussion would be required. Other factors, however, do exist. One of the proposed regulations expressly provided that back pay constituted an appropriate remedy to be sought in administrative and judicial enforcement proceedings. Whether this provision mitigated the effect of non-inclusion of the back pay phrase in the proposed regulation thus is squarely presented.

Because the policy of providing for back pay relief in administrative and judicial enforcement proceedings is significantly different from that of providing for it in a conciliation agreement,[227] it appears that the inclusion of the provision relating to adjudicatory proceedings did not abrogate the need to comply with the APA publish and comment procedures with respect to the amendment of the conciliation agreement section.[228] It may be argued that the APA requirements do not apply because the procedure creates no substantive right, since it extends only to those who choose to use it. This argument, however, failed in *National Motor Freight*, in which the court stated: "A right to avail oneself of an administrative adjudication of this kind does not become trivial simply because it is optional."[229] Nor does the importance of informal settlement procedures as an adjunct to the judicial and administrative schemes provided by the Order constitute a basis for upholding the inclusion of the back pay provision in the conciliation agreement regulation. On this point, the *National Motor Freight* court stated:

> The Commission was . . . under no injunction from Congress to provide such a supplement. It would not have been derelict in any way *vis-a-vis* Congress if it had concluded to act only in the ancillary role explicitly defined in the amendments to the Act. Its decision to anticipate voluntary settlement before resort to the courts . . . was not a necessary consequence of the change in law. Whether the Commission should have taken that decision at all, and, if so, what the precise form and scope of the procedure should be, were questions suitable for exploration and informal rule making. The Commission now assures us that what it did was important to the proper implementation of the statutory scheme for judicial reparations. But that very quality of importance—to the industry and to the public—is what lies at the base of Section 4 of the APA and which informs the Congressional purpose in that law to expose proposed agency action by general rule to the test of prior examination and comment by the affected parties.[230]

The action of OFCCP with respect to back pay clearly falls within the ambit of the *National Motor Freight* decision. First, it is not clear that the Order conferred any right to back pay. Second, the express language of the Order only provides a judicial avenue for such relief. Third, because the major function of OFCCP is overseeing compliance with affirmative

227. *See* text accompanying notes 9-11 *supra*.

228. 268 F. Supp. 90 (D.C. 1967), *aff'd* 393 U.S. 18 (1968).

229. *Id.* at 96.

230. *Id.*

action obligations, and not calculating back pay awards, the decision concerning back pay is not a "routine determination" of that agency. Fourth, the Order did not obligate, or indeed permit, OFCCP to act as an adjunct to the judicial procedure.[231] And finally, having proposed these procedures initially in the 1975 guidelines, OFCCP obviously considers them to be important.

As stated earlier, the court in *Illinois Tool Works, Inc. v. Marshall*[232] expressly held that a hearing on the merits is necessary to determine whether an affected class problem exists for which relief in a conciliation agreement could be sought. Once a hearing is required, resort to a conciliation agreement ceases to serve the "informal settlement" function. The authors thus conclude that the phrase was invalidly included in the conciliation agreement section of the final regulations.[233] Consequently, it is arguable that even after the 1977 regulations, only "corrective" action could be required in conciliation agreements.

Moreover, the fact that OFCCP dropped its proposal to add a subsection to section 60-1.24, which deals solely with written conciliation agreements, coupled with the consideration that the explanatory comments accompanying the final rules did not even mention the inclusion of the back pay phrase, might well have misled contractors, and thus supports the authors' conclusion. It is, of course, arguable that since the

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231. In fact, a referral to the Dept. of Justice or to the EEOC is all that is permitted by the Order. *See* § 209.

232. 601 F.2d 943 (7th Cir. 1979). *See* text accompanying notes 82-94 *supra.*

233. A contention that settlement through a conciliation agreement is voluntary and thus the effect of the inclusion is minor does not pass muster. In National Motor Freight Traffic Ass'n v. United States, 268 F. Supp. 90 (D. D.C. 1967), *aff'd,* 383 U.S. 18 (1968), the Interstate Commerce Commission's arguments along these lines were given short shrift by the court, even though the merits of the issue were not reached. The court stated:

> The Commission casts its argument in the form that the "right to reparations is conferred by statute, and the notice itself confers no new substantive right on any party . . . it merely provides a procedure which may be voluntarily used" to settle reparation claims. Of course, whether Congress has conferred by statute any "right to reparations" whatsoever through purely administrative means is the precise issue raised by plaintiffs in their submission on the merits. We have, as indicated above, not thought it necessary to reach the merits in this case because, even if we were to decide that the Commission is not foreclosed by any Congressional or other restraint from doing what it did, we would still be of the view that Section 4 was applicable and should have been observed. That agency action falls within the permissible scope of statutory authority does not alone answer the question of the applicability of Section 4.
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> It is, in any event, clear that Congress did not in express terms in the 1965 amendments provide more than a judicial avenue to reparations. It may be that, properly viewed, this limitation did not proscribe the informal and voluntary administrative procedures at issue here, but this assumed authority on the part of the Commission to act does not mean that its action is so insignificant in nature and impact as to fall outside the rulemaking requirements of Section 4.
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> The reverse would, indeed, appear to be true. Even assuming the power, the decision by the Commission to make its administrative processes and expertise available for a regular course of finding formerly effective rates to be illegal in order that rebates may be made without violating the statutory prohibitions upon discrimination, that decision, we repeat, is hardly a routine determination in the discharge of the Commission's important functions, as witness the critical importance which the Commission itself now attributes to this device.

Id. at 95-96.

insertion of the phrase in section 60-2.1 achieved the same result as the proposed subsection, the notice requirement was met. However, based on notions of fundamental fairness and in light of the substantial impact of this regulation, strict compliance with the APA requirements should be required. Therefore, OFCCP should not be permitted to prevail.[234]

If, in fact, the policy of inclusion of back pay relief in conciliation agreements was not validly promulgated in the 1977 regulations, and if this policy was not exempt from the publish and comment procedures, then assuming the substantive nexus, it follows that the policy was first validly incorporated into section 60-1.33, effective on January 28, 1980.[235]

IV. CONCLUSION

For the foregoing reasons, the authors have concluded that the regulations authorizing the collection of back pay by OFCCP in extra-judicial proceedings are invalid and illegal. It is hoped that OFCCP will voluntarily reexamine its regulations on these issues. In the alternative, it is desirable that a contractor will fight the agency through the requisite judicial processes to reach a final ruling.

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234. The remedies available to contractors who relied to their detriment upon improperly promulgated rules is beyond the scope of this Article.

235. 44 Fed. Reg. 77,000 (1979).